

## Engendering reproductive rights in the inter-American system

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A woman in a red dress stands in a doorway, holding a long stick. The scene is dimly lit with a warm, orange glow.

# Gender, Sexuality and Social Justice: What's Law Got to Do with It?

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Kay Lalor, Elizabeth Mills,  
Arturo Sánchez García and Polly Haste

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Front cover:  
Sex workers in  
Bangladesh  
passing the time  
while waiting  
for clients.

## Acknowledgements

This Collection is part of an ongoing dialogue between activists, academics, donors, and the partners of the Institute of Development Studies Sexuality, Poverty and Law (SPL) programme. In March 2015, all contributors to this Edited Collection met with colleagues and friends in Brighton, UK as participants at the Symposium 'Sexuality and Social Justice: What's Law Got to Do with It?', to share their views on, challenges to, and imaginaries of justice. The present Collection is a testament to those dialogues.

The Symposium was part of the ongoing work of the IDS SPL programme. It followed in the footsteps of the Sexuality and Social Justice Toolkit,<sup>1</sup> which acted as a forum for developing the ideas that are further explored in this Edited Collection. The Symposium would not have been possible without the dedicated work of Polly Haste, Elizabeth Mills and Jas Vaghadia at IDS, and Arturo Sánchez García at the University of Kent. The SPL Advisory Board and the working group in IDS (Stephen Wood, Cheryl Overs and Linda Waldman) were also crucial in shaping the Symposium. The work of the IDS Communications and publications professionals (including Carol Smithyes, Peter Mason, Alison Norwood, Beth Mudford and Lance Bellers) continues to be invaluable on the Edited Collection. The academic advisory support of Kate Bedford and the Kent Centre for Law, Gender and Sexuality, in the University of Kent, was also central to the process; as was the work of Kay Lalor at Manchester Metropolitan University, together with Polly Haste and Chloe Vaast, in recording the sessions and writing the Symposium report;<sup>2</sup> and the same for Monica Allen and Dee Scholey's work in the careful editing of this Collection.

In conjunction with the Symposium, IDS hosted the annual meeting of PECANS, a network of Post Graduate and Early Career Network of Scholars producing innovative research on sexuality, law and gender. Some PECANS participants contributed to this Collection. The final product is the result of the commitment that every one of the participants – in different stages of the process – has individually and collectively invested in this Collection. It is a tangible demonstration of the significance of exchanges of ideas about the way sexual rights and gender identity-based struggles can (or should) improve lives.

Ultimately, these dialogues are in debt to all people working in the field, to the ongoing conversations taking place around the world, including those conversations that could not happen in Brighton, but that remain central to the production of updated and powerful notions of justice and for the imagination of alternative futures in which these notions of justice can be realised.

All photographs are attributed on the inside back cover.

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<sup>1</sup> <http://spl.ids.ac.uk/sexuality-and-social-justice-toolkit>

<sup>2</sup> [www.ids.ac.uk/publication/sexuality-and-social-justice-what-s-law-got-to-do-with-it-international-symposium-workshop-report](http://www.ids.ac.uk/publication/sexuality-and-social-justice-what-s-law-got-to-do-with-it-international-symposium-workshop-report)

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## Foreword

**T**he contributions to this Edited Collection reveal the complexity of the deceptively simple question posed by its title: *Gender, Sexuality and Social Justice: What's Law Got to Do With It?* Many of those involved in this publication are directly involved in and affected by the issues to which the Edited Collection's title speaks. From activists working with women in Assam's tea gardens in India or young lesbian, gay, bisexual and transgender leaders in Vietnam, to lawyers fighting the Anti-Homosexuality Bill in Uganda or the criminalisation of cross-dressing in Malaysia, to academics carefully re-reading Islamic Sharia or researchers assessing HIV prevention programmes in South Africa, the contributors to this Collection have first-hand knowledge and experience of the complexities of gender, sexuality and social justice.

The product of this vast array of experience is a series of conversations that decisively indicate that the question of law's relation to sexuality, gender and social justice does not have a single, simple answer. The increased legalisation of processes by which sexual, sexuality and gender justice is sought requires interrogation and careful scrutiny and, as the contributions in this Collection show, the law is often an imperfect tool for achieving meaningful justice.

Yet it is in these important and complex conversations that the scope for future action becomes tangible. In exploring different processes by which activists and other actors have worked for change, in interrogating what we mean when we talk about 'solidarity', and in questioning the usefulness and place of law, a picture of a complex but vibrant field of action for sexuality and gender justice begins to emerge. This Collection offers multiple routes to sexuality and gender justice and numerous suggestions of what sexuality and gender justice could be in a plurality of contexts. It also suggests that there are many potential pitfalls and barriers to justice or progress. What this Collection highlights, however, is that by listening carefully to each other and by paying careful attention to the needs of those working on the ground, we give ourselves the best chances of success, individually and collectively. The ongoing conversations in this Collection are part of this process. It has been a privilege to be part of them and we will watch how they develop further with interest and with hope.

▲ 'The day when identity got legalised.' A group holding the banner for the National Front for Gender Identity in a rally in front of the National Congress in Buenos Aires, Argentina.

# Abbreviations and Acronyms

ABOSEX	Lawyers for Sexual Rights
ACHPR	African Commission on Human and Peoples' Rights/African Charter on Human and Peoples' Rights
ADEFHO	Association for the Defense of Homosexuality
AHB/A	Anti-Homosexuality Bill/Act
BCA	Be Change Agents
CBO	Community-Based Organisation
CCIHP	Centre for Creative Initiatives in Health and Population
CECEM	Centre for Community Empowerment
CEDAW	United Nations Convention on the Elimination of All Forms of Discrimination against Women
CFCS	Changing Faces Changing Spaces
CHA	Comunidad Homosexual Argentina
CSCHRCL	Civil Society Coalition on Human Rights and Constitutional Law
CSO	Civil Society Organisation
EHAHRDP	East and Horn of African Human Rights Defenders Project
ESHRI	East African Sexual Health and Rights Initiative
FARUG	Freedom and Roam Uganda
HAART	highly active antiretroviral therapy
HIV/AIDS	Human Immunodeficiency Virus/Acquired Immune Deficiency Syndrome
HRAPF	Human Rights Awareness and Promotion Forum
ICT	information and communications technology
IDAHOT	International Day Against Homophobia and Transphobia
IDS	Institute of Development Studies
IFI	international financial institution
IGLHRC	International Gay and Lesbian Human Rights Commission
IMF	International Monetary Fund
IOC	Organisation of Islamic Cooperation
iSEE	Institute for Studies of Society, Economy and Environment
IVF	in vitro fertilisation
KNEC	Kenya National Examination Council
LE	legal empowerment

LGBT	lesbian, gay, bisexual and transgender
LGBTI	lesbian, gay, bisexual, transgender and intersex
LGBTQ	lesbian, gay, bisexual, transgender, intersex and queer/questioning
MSM	men who have sex with men
NACOSA	National AIDS Coordinating Committee of South Africa
NAP	National AIDS Plan
NGO	non-governmental organisation
PAfID	Policy Audits for Inclusive Development
PAHO	Pan American Health Organization
PAS	Parti Islam Se-Malaysia
PEPFAR	US President's Emergency Plan for AIDS Relief
PFLAG	formerly Parents, Families and Friends of Lesbians and Gays
PLHIV	people living with HIV
PLWHA	people living with HIV and AIDS
Q&A	question and answer
SA	social accountability
SMUG	Sexual Minorities Uganda
SOGI	sexual orientation and gender identity
SOGIE	sexual orientation and gender identity and expression
SPL	Sexuality, Poverty and Law
STI	sexually transmitted infection
TAC	Treatment Action Campaign
TB	tuberculosis
TEA	Transgender Education and Advocacy
UHAI-ESHRI	East African Sexual Health and Rights Initiative
UMNO	United Malays National Organisation
UNDP	United Nations Development Programme
UNFPA	United Nations Population Fund
UNHCR	United Nations High Commissioner for Refugees
USAID	United States Agency for International Development
VAW	violence against women
ViLEAD	Vietnam LGBT Leadership Development Program
VNIGSH	Vietnam Nation-Wide Institute on Gender, Sexuality and Health
WHO	World Health Organization
WPATH	World Professional Association for Transgender Health
WSW	women who have sex with women



# Starting Conversations: A Cross-Continental Dialogue on Avenues to Advance Sexuality and Gender Justice

## PART 1

ELIZABETH MILLS, KAY LALOR AND ARTURO SÁNCHEZ GARCÍA

We write this introduction at the conclusion of our journey to finalise this Edited Collection, cognisant that the starting place for collaboration matters:

If you start from the ‘negative minimalisms’ (Thin 2008: 149) of sheer survival and bare life, of violence, suffering, deprivation, and destitution, then you provide a very different description of lives than if you begin from people’s situated concerns... [O]ur tendency to focus on the dystopic has been at the price of forgetting to think about ‘other ways of thinking’ (Marsland and Prince 2012: 464).

The Sexuality, Gender and Social Justice Edited Collection offers ‘other ways of thinking’ about the rapidly changing nature of sexuality and gender politics and the need to interrogate the way in which law and legal processes translate into lived experience in different socioeconomic, political and legal contexts. We started this journey with a shared belief that dialogue, where both talking and listening are given equal importance, matters and is an important starting point for fostering meaningful social transformation.

This Edited Collection offers ‘an other way’ of talking through the rich array of visual and written contributions by 33 people in at least 20 countries that span almost every continent in the world.



◀ A bar in central Kampala, Uganda, popular with the Ugandan LGBTQI community. One evening a week they have 'Kuchu Night' where many from the community come together to socialise.

**Elizabeth Mills** trained as a social anthropologist in South Africa and has historically pursued an interest in the relationship between gender, science and citizenship. She completed her MPhil at the University of Cambridge and her PhD at the University of Sussex. Her research lies at the interface of political and medical anthropology, and has historically explored the intersection of embodiment, science and activism linked to the global development and distribution of medicine. Currently, Elizabeth convenes the Sexuality, Poverty and Law Programme at the Institute of Development Studies (IDS) and conducts research on gender, health, citizenship and masculinities in West and Southern Africa.

**Kay Lalor** holds a Leverhulme Early Career Fellowship for her project, 'International Relations and LGBTI rights: Conditionality, Diplomacy and Activism'. This research investigates different forms of international pressure used to advance international lesbian, gay, bisexual, transgender and intersex (LGBTI) rights across borders and within different cultures and jurisdictions. Her PhD research *Uneven Encounters and Paradoxical Rights: Embodiment and Difference in Sexual Orientation Rights and Activism* analysed the growth of LGBT rights language in international legal arenas. She lectures in human rights law at Manchester Metropolitan University.

**Arturo Sánchez García** has a diploma in Independent Filmmaking (Asociación Mexicana de Cineastas Independientes (AMCI), Mexico), a degree in Communications (Universidad Iberoamericana, Mexico), a master's degree in Human Rights (Universidad Carlos III de Madrid, Spain), and a doctorate in Law (University of Kent). In his PhD research he analyses the legislation on abortion and same-sex marriage in Mexico City, and the parallel evolution of social movements and the judiciary in relation to democratisation. His research interests include feminism, postcolonial theory, social movements and queer theory. Arturo is currently exploring ways to link sexuality with the theoretical work of optimism and hope.

Through this array of contributions, the Collection suggests that perhaps there are also ways that we can listen better to one another. This approach to 'listening' was fostered during the Legal Symposium held in March 2015 and it continues through the interweaving of accounts of lawyers, activists and academics throughout this Collection.

This Collection does not start from a point of 'negative minimalisms' that foreground the extent to which oppressive structures bear down on people's ability to navigate their life, nor does it insist on describing the origins and causes of exclusion and discrimination linked to sexuality and gender. It is also not entirely reflective of the enduring possibility of hope held in the writing of Hannah Arendt and others where, 'the

fundamental condition of politics is... plural [and] goes on among plural human beings each of whom can act and start something new' (Marsland and Prince 2012: 464). Instead, this

Collection lies somewhere in the middle: people are its starting place, and because it is situated in their lives, it is a far muddier story. It offers hope in the quieter everyday ways that people and communities have resisted oppressive structures that limit their lives on the basis of their gender identity and sexuality, but it also asks us to bear witness to the violent politics of their precarious lives.



## 1 Background

The journey of the Edited Collection stretches back to the International Symposium on Sexuality and Social Justice: What's Law Got to Do with It? held in March 2015. The Symposium was organised by the Institute of Development Studies (IDS)<sup>1</sup> and brought together activists, lawyers and researchers from around the world, representing a broad range of expertise in the field of sexuality, gender identity, rights and social justice. The Symposium was part of the ongoing work of the Sexuality, Poverty and Law (SPL) programme.<sup>2</sup> The SPL programme's work explores the way in which human rights activists, legal practitioners and donors can effect meaningful change in the lives of people marginalised on the basis of their sexuality and gender identity.

The articles in this Collection were contributed by participants who attended and presented at the Symposium. Contributors include lawyers and legal practitioners involved in litigating leading cases of sexual and gender rights in diverse jurisdictions, and activists and academics working within the wider social and academic contexts of these legal developments. The diversity of participants reflects the complex and multilayered issues addressed by the Symposium and the importance of pluralist and context-specific responses to injustices. The richness of the discussion was highlighted by Baroness Northover in her closing keynote speech: 'This is cutting edge work. It is exceptionally important for some of the most marginalised people in the world, who cannot be who they are without this work.'

## 2 Law and the changing nature of sexuality and gender politics

Our interest in exploring sexual and gender justice reflects an ongoing tension in the way in which law and rights feature in current debates on sexuality and gender politics. Appeals to law are

an increasingly common feature of movements that pursue different forms of sexual and/or gender justice and as some contributions in this Collection demonstrate, these appeals can be successful.<sup>3</sup> However, as other contributors highlight, the tension of this 'turn to law' manifests itself in the way in which the diverse forms that sexual and gender justice might take are increasingly translated into legal language and frameworks – including the language of rights. This Collection seeks to recognise and acknowledge rather than resolve

this tension. Thus, the pursuit of sexual and gender justice recounted in this Collection encompasses, among other topics, transgender advocacy, lesbian, gay, bisexual and transgender (LGBT) rights struggles,

capacity building among young people, women's health and security, religion, movements across borders and questions of resource allocation and socioeconomic exclusion. The law may play a greater or lesser role in any of these struggles.

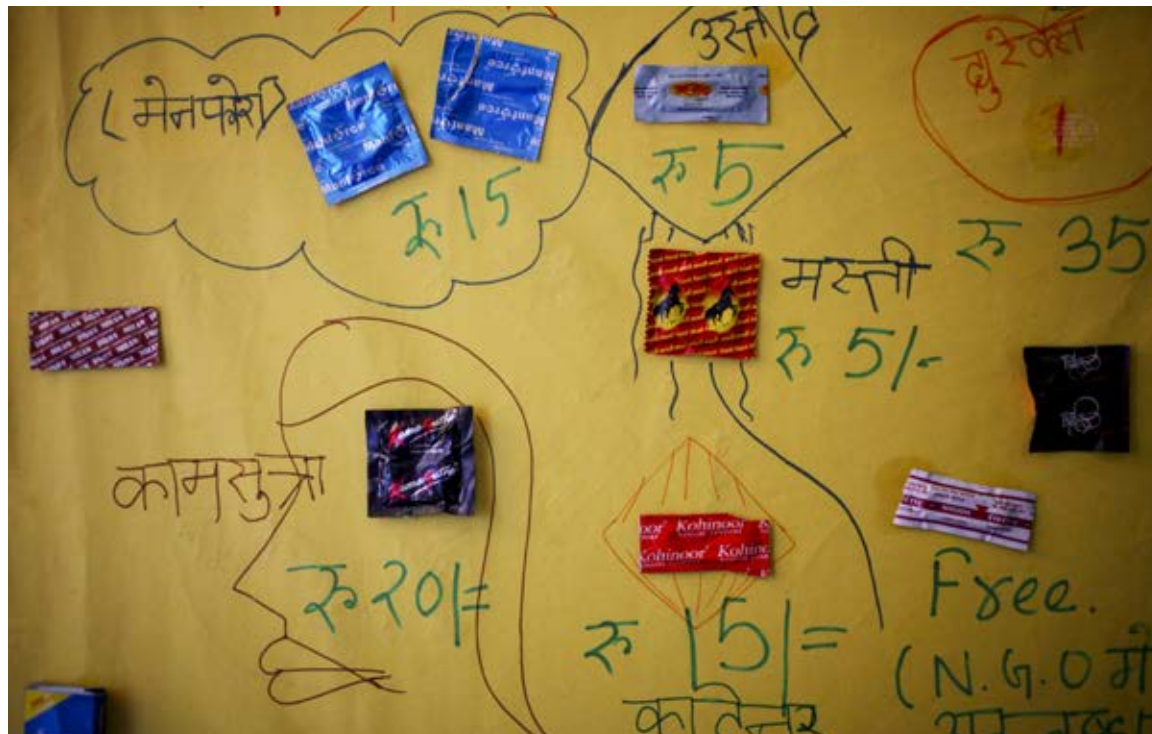
The aim in this Collection, therefore, is not to bring all discourses together under one label, movement or form of activism – legal or otherwise – but to listen carefully to diverse and often unheard voices. Sexual and gender justice may refer to the law, or to sexual rights,<sup>4</sup> but this is not all that it encompasses, or all this Collection seeks to explore. Key to the ground-breaking nature of this work is the interrogation of changing dynamics of sexuality and gender politics by asking how law and legal processes translate into people's lived experience in different socioeconomic, political and legal contexts. The multiple different legal pathways through which sexual rights or sexual and gender justice can be approached demand that we assess both the scope and the limitations of the legal processes upon which we are often reliant. The articles in this Collection explore the opportunities and limitations of law in the context of sexuality and gender, and examine the role of the law in reducing economic and social exclusion.

The contributions to the Edited Collection coalesce around two main questions: how useful is the law for attaining sexual and gender justice? And what is the scope for joint working to advance sexual and gender rights? Unsurprisingly, the responses to these questions are complex, multifaceted and often open-ended. There is not a simple, single solution – legal or otherwise – to the question of sexual and gender justice. Instead, the contributions that follow offer a series of interventions, dialogues and reflections on what works and what has not worked, what remains to be explored and the scope to work together in the process of this exploration.

The answers to these two core questions encourage substantive engagement with the messiness of social justice for sexuality and gender equality. Reflecting a range of 'new ways of thinking', the contributors to this Collection:

- Interrogate existing assumptions about the capacity of law and legal processes to affect change, particularly for marginalised communities, by exploring practical experiences from the perspective of lawyers, activists and scholars;
- Advance thinking about the relationship between law and sexual rights advocacy by reassessing contemporary legal expressions of sexual orientation, gender identity and other aspects of sexuality;
- Document evidence of the impact of legal processes on social and economic marginalisation, including people's ability to access basic services, contribute to their communities and build advocacy efforts;

“The diverse forms that sexual and gender justice might take are increasingly translated into legal language and frameworks.”



◀ Poster on the wall at the Targeted Intervention Project run by Delhi State AIDS Control Society on Delhi's notorious GB Road, home to the majority of the city's 3,000 sex workers, in India.

- Broaden traditional academic platforms of engagement by facilitating dialogue between a wide range of practitioners – lawyers, activists, artists and others – to map out opportunities for collaboration and practical options for policy influencing.

This therefore is an 'unruly' publication. It grows from a shared sense of injustice and it builds on a shared commitment to ensuring that the sexual rights movement is a space for unity. In doing so, it recognises that unity does not mean uniformity: for this movement to flourish, we need to foster its different manifestations, iterations and priorities at both global and local levels.

### 3 Righting history

'History gets written by who gets to the paper first.' So just as Europeans claimed to have 'discovered' African mountains and lakes, without regard to the Africans already living there, queer landscapes are now being 'discovered' by the global North. These queer landscapes are being put on paper and in statements. So much so that there is now a great deal of 'stumbling over allies' (Wanja Muguongo in Lalor, Haste and Vaast 2015).

This critique was offered by a participant at the Symposium during a discussion on Western writers' and activists' domination of discourse on sexuality and gender identity in Africa. Reflecting on the value of dialogue, a number of contributions in the Edited Collection address this critique and highlight the importance of really listening to a range of local voices engaged in the struggle for sexual rights across a plurality of contexts. The voices of those at the

grass-roots level often risk being subsumed into global narratives, obscuring the local knowledge of those who are at the forefront of these struggles.

This Collection cannot redress this imbalance of power. It does, however, recognise the need for participation in a dialogue where there is scope to speak in new ways and participate in conversations beyond the academic or the political narratives that currently dominate sexuality, gender and legal landscapes. This is a conversation that takes many different forms and the contributions to the Collection reflect this.

### 4 Outlining the Collection

As befits an unruly publication, the contributions in this Collection do not adhere to a single format. Contributions include academic papers, personal reflections, photo essays, case studies and reports as well as think pieces.

In keeping with the question of how we listen and communicate, the Collection proceeds with an awareness of the way in which any discussion of social justice is limited if there is no reflection on the kind of language that we use to discuss those rights. Exchanges between activists, lawyers, donors and others must be sensitive to the question of how the use of language implicates broader power dynamics. Terminology such as LGBT may be useful, but there is a risk that the overreliance on umbrella terms will limit understanding of lived experiences and contexts.

This tension is expanded in Rahul Rao's opening reflection. In beginning with the question of what social justice means, and what social justice could

mean, Rao invites us to contemplate the complexity of sexuality as it is situated within historical and material terrains. Crucially, Rao articulates some of the questions that we might ask ourselves if we are to move beyond negative minimalisms, embedded in history and aware of the material struggles faced by those advocating for sexual rights on the ground.

The sections of the Collection that follow these introductory pieces are arranged around the two key questions outlined above. Part 2 asks how useful

“Sexuality and social justice is not simply a question of law, but a multifaceted struggle.”

the law is for attaining sexual and gender justice. Several contributions discuss the opportunities and dangers of using a legal framework to advance sexual rights claims. The articles that follow seek to place the law within its wider context, highlighting the economic and developmental frameworks within which sexual rights claims must be placed in order to properly address exclusion and marginalisation.

Part 3 interrogates the scope for joint working to achieve sexual rights. The contributions in the section offer examples of projects that have sought to open up innovative spaces and dialogues in order to pursue sexual rights. These articles offer both examples of successful activism and actions, and critiques of the barriers to successful joint working. These contributions evidence different methodologies by which law and legal processes are encountered and also draw attention to the way in which engagement with sexuality and social justice demands that wider questions of socioeconomic inequality, entrenched power and international discourses of sexuality and rights are acknowledged and addressed. Sexuality and social justice is not simply a question of law, but a multifaceted struggle that takes place in many different ways across multiple locations. The contributions in this Collection draw attention to the particularities of place and location: we may have shared goals or aims, but the nuance with which the contributions describe their own particular engagements with sexuality and social justice makes clear how important it is to pay close attention to the particularities of the local context in which these engagements play out.

Many of the contributions to this Collection prompt us to question what solidarity means and how it might be transformed in order to produce a shared notion of justice. In brief, how might we understand solidarity in a way that is capable of acknowledging the different trajectories and needs of activists and organisations and that acts as a corrective to the co-option of international solidarity by powerful international voices? The final contributions in the Collection seek to reflect these debates. The desire to support and show solidarity for sexual and gender

minorities in the global South and elsewhere is a clear and admirable goal, but the idea of solidarity should not overwhelm the work of local partners or lead to a scenario in which local voices are eclipsed by the dictates of a global agenda. The final section of the Collection engages with a number of short reflections on the meaning of solidarity. The reflections are as varied and challenging as the Collection itself.

## 5 Towards a conclusion

A cross-continental conversation about avenues to promote solidarity and sexuality and social justice prompt questions that do not have simple answers: they lend themselves to praxis, to asking and listening and to acknowledging the unruly ground between hope and doubt, situated within multiple histories, socioeconomic inequalities and frameworks of law and state power that are, at best, a double-edged sword. The articles in this Collection reflect this complex ground, seeking other ways of thinking about the problems and questions that arise. The aim here is to seek out and explore the muddier middle ground of the politics of sexuality and social justice. This is not done in the hope of solving the contradictions that inhere in this terrain, but with a view to thinking about new and transformative processes by which legal, historical and socioeconomic inequalities might be addressed or how the embedded power of the state or other actors might be made visible and challenged. What follows is not a simple set of answers to the question of what sexual and gender justice might look like, but an engagement in an ongoing conversation, with multiple interlocutors, in which the act of listening carefully and differently is at the centre of processes of transformation.

### Endnotes

<sup>1</sup> This symposium was organised in collaboration with the Kent Centre for Law, Gender and Sexuality at the University of Kent, UK.

<sup>2</sup> The Sexuality, Poverty and Law Programme is a four-year programme (2012–16) funded through an Accountable Grant from the UK Department for International Development (DFID).

<sup>3</sup> See Paiva, this Collection.

<sup>4</sup> The editors refer to ‘sexual rights’ as those rights broadly related to sexuality and gender identity expressed in legal language, including reproductive rights, sex workers’ rights, transgender rights, intersex rights and LGB rights.

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# Sexuality and Social Justice: Questions for Dialogue<sup>1</sup>

**RAHUL RAO**

Let us take the title of the symposium seriously: sexuality and social justice. We spend quite a lot of time thinking about sexuality and gender identity, feminism and human rights, but I'm not sure we spend as much time thinking about social justice. I want to reflect on what this means. What has it meant? What could it mean?

In some ways the phrase is a curious leftover from socialist struggles, encapsulating priorities that have tended to become eclipsed by other things. I think sometimes we use 'human rights' as a shorthand for social justice, but one question to ask might be whether it is an adequate shorthand. Above all, there is an overriding question for us today: is law an adequate means for reaching either human rights or social justice?

There are at least two types of critiques of human rights that we encounter and work with: one sees human rights as necessary and useful, but inadequate, which leaves us thinking about ways to supplement human rights with other kinds of work that might lead us to the ends of human rights. The other kind of critique is a more thoroughgoing one that sees human rights law as possibly counterproductive. I hope we can reflect on both kinds of critiques.

First, the idea of human rights as necessary but inadequate, and in need of supplement. Let me provide a contextual example that many of you may find familiar. I'm sure that we have all, in the course of our work on sexuality and gender identity in various places, encountered the idea that practices of same-sex sexuality or gender identity transformation are in some sense alien or culturally inauthentic: certainly, this is an argument I have encountered in the course of my work on India and Uganda. How do social movements respond to this argument about cultural inauthenticity?

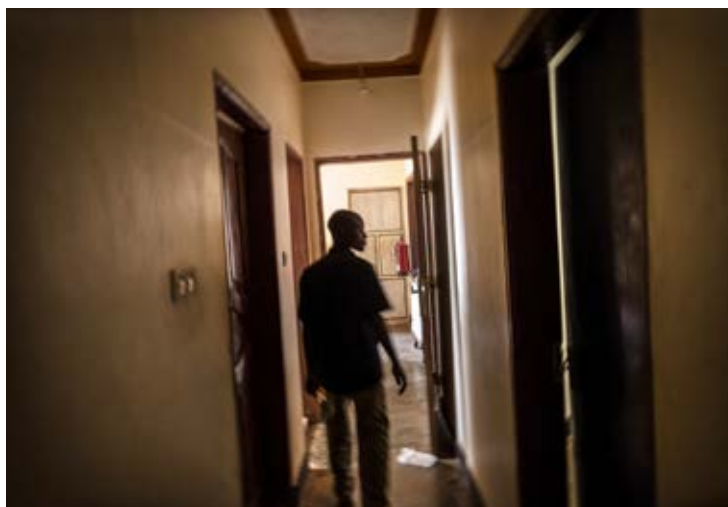
History can potentially be a useful and subversive tool in some struggles. Queer histories have the potential to produce alternative stories, providing evidence of the existence of same-sex love in all places and all times. In the context of Uganda, we can recall a very well-known story: this is the story of the last pre-colonial ruler of the kingdom of Buganda, the largest of the kingdoms that were merged to create the modern state of Uganda. It is the story of Kabaka Mwanga, who is believed to have had sex with men in his court, until those men converted to Christianity

and began to refuse the king's sexual desires. He has them burnt alive for their disobedience in a very public execution (this happens in the late-nineteenth century, just before the British established a Protectorate over Uganda). The Catholic Church canonises the king's pages, who became known as the Uganda Martyrs. As a result of this process of canonisation, the Uganda Martyrs are very well known. Everybody in Uganda knows or has a version of this story. There is an annual feast day on 3 June to commemorate them, and there are several shrines dedicated to them, the most important of which is visited by almost a million pilgrims every year.

In my research (Rao 2015) I have been asking people who come to the shrines a very simple question: why did Mwanga kill these men? I have been collecting different versions of the story, some of which acknowledge that same-sex sexual encounters took place: there is something extraordinary about the fact of same-sex intimacy lying at the heart of this story, which is a founding myth of Christianity in Uganda. Other versions do not acknowledge a possible sexual dimension at all. What I have been trying to do in my work is to shift the focus from history to memory. For me what is important is not necessarily what actually happened, but what people today think might have happened, on the grounds that memory is politically more consequential than a purportedly authoritative account of what 'actually' happened.

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▼ LGBT activist Sam Ganafa walks through the home he has been unable to return to since tabloid newspaper *Red Pepper* published the list of 'Uganda's top 200 homos'.



I also find the practice of collecting stories and thinking about memory a much less didactic way of entering into a conversation about sex and sexuality than a human rights strategy. I am very conscious of my own status as an outsider to Uganda, so I am concerned not to be seen to be telling people what to think. I think of my role more as one of a curator collecting stories, saying this is what Ugandans already think and say about their own history. There are already stories that are circulating in this society that acknowledge the existence of same-sex encounters. I'm particularly interested in this story because it circulates in religious spaces and is retold by believing Christians.

This brings us also to the question of religion, which is extremely important for us to consider especially if religion is seen in an oppositional way to the kinds of spaces we inhabit. What is the relationship between religion and the work we do? Do we always encounter religion in an oppositional way? Sometimes of course this is a necessary opposition! But are there other ways of imagining and negotiating this encounter?

Work of the kind I have just described doesn't necessarily see human rights as a problem, so much as inadequate. It seeks to supplement human rights with other strategies. Certainly in the Ugandan context the use of the law, courts and human rights has been very successful domestically. But there are also critiques

of human rights that see them as a problem, and see the use of law as actively counterproductive in many contexts.

There are many places we might go to find this critique, but one that is particularly compelling is offered by Dean Spade, the trans legal theorist, thinking and writing in the US context. His book *Normal Life* critiques the single-minded focus on strengthening hate

crime law and antidiscrimination law as a lesbian, gay, bisexual and transgender (LGBT) activist priority (Spade 2001). One of the problems that Spade identifies is that much of this law has a very limited sense of what social injustice is. It offers a way of thinking about social injustice that focuses only on situations of individual harm perpetration, where harm is reduced to the punishable act of one individual against another. This way of understanding harm, Spade argues, ignores and obscures structural and systemic injustice: what do we call the phenomenon whereby black majority areas just 'happen' to have the worst public services? How do we understand these kinds of structural and systemic outcomes?

Another critique that Spade articulates is the idea that the move to strengthen penal laws against hate crimes ends up legitimising and strengthening the

criminal justice system that targets the very people that it is supposed to protect. This might sound very specific to the US context: certainly it comes out of fields of study like critical race theory, drawing on the work of writers like Angela Davis on the prison industrial complex. But perhaps we can see analogues of this kind of argument in other contexts as well.

In India, there has been a fierce debate over rape law, and in particular over the issue of gender neutrality in rape law. This is an issue that has opened up differences among people who are otherwise allies. It is an issue on which feminist, queer and *hijra* activists often have quite different positions. Some queer male activists have pushed for a gender-neutral rape law on the grounds that the law needs to recognise that people of all genders suffer rape. Many feminists, both heterosexual and lesbian, have argued against this on the grounds that the law could be misused by men against women, and on the grounds also that gender neutrality would ignore the reality that rape is mostly an experience that women suffer at the hands of men. And some *hijra* activists have argued that the spaces of the law and the police can never be made safe for *hijras*, and that the priority should therefore be to push the state out of their lives, rather than to welcome it in and seek its protection.

I offer these snapshots as a way of articulating a broader question: what is our attitude towards the state? What do we want from the state? Do we want the protection of the state? Do we seek to civilise the state? Do we want to push the state out of our lives? On what terms do we seek to engage with the state? But also, who is the 'we' here? This points not just to the difficult question of the power relations between the L, the G, the B, the T, the I, the Q, etc. It is also about the relationship between the Woman Question, as it was posed in the nineteenth century – the enduring Woman Question – and the agenda around LGBT, intersex and queer (Rao 2014).

I have said something about human rights as inadequate and in need of supplement; and also about human rights as possibly utterly problematic, and the space of the law and the state as irredeemably hostile. But I want to return now to the question of social justice that I began with, to think about what social justice means, and what human rights might miss in functioning as a shorthand for social justice. This opens up a number of questions, one of which is the enduring debate over single-issue politics and coalitional politics. My entry point here is that even if we thought of ourselves as engaged in single-issue politics concerned with rights of sexual orientation and gender identity, the kinds of struggles that we are engaged in *necessarily* require a broader vision. Let me get more specific and unpack this a bit. One of the things I'm interested in understanding

“This way of understanding harm... ignores and obscures structural and systemic injustice.”

is the phenomenon or effect of homophobia. What is homophobia? What is transphobia? What is queerphobia? Is it 'just' a cultural attitude? Is it a material injustice? Is it a combination of these things? Are the cultural and the material inseparable?

I have been thinking about this in the Indian and Ugandan contexts, but particularly in Uganda, in respect of which there has been much discussion around the Anti-Homosexuality Act, now struck down, of course. A lot of the conversation has been about elites: elite politicians, elite clergy, the relationships between these different groups, and the US–Uganda relationship at this elite level. I have become interested in the question of why these elites find homophobia useful. My sense is that they find homophobia, transphobia and queerphobia useful because it is popular, because it is a rhetoric that draws crowds onto the streets and fills church pews. Why does this happen? How do we account for the popularity of these phobias?

Here I have found very useful the work being done by Joanna Sadgrove, Kevin Ward and a team of collaborators in Leeds, which has been published as an article entitled 'Morality Plays and Money Matters' (Sadgrove *et al.* 2012). It looks at the relationship between moral panics and material things. They use the notion of moral panic to explain why queerphobic discourses resonate with ordinary people. Moral panics occur not just around homosexuality but also around other issues like pornography, prostitution, child sacrifice, witchcraft, drugs, alcohol, and all the other social vices that priests and politicians mention in their sermons and speeches. Sadgrove *et al.* argue that these moral panics purport to provide answers to questions that ordinary people are asking. Families are falling apart for all sorts of reasons and people want to know why; people are in search of explanations for these upheavals. The reasons why this is happening are not hard to see: the pervasiveness of a sense of precarity is unsurprising in a society that has experienced years or decades of civil war, the HIV/AIDS pandemic, debt, structural adjustment, neoliberalism, mal-governance, corruption, authoritarianism, and all sorts of other unsavoury things. Amid these challenges, the figure of the queer becomes useful because it gives politicians and priests a convenient scapegoat on whom to place responsibility, in response to the questions that people are seeking answers to. The broader argument I am making is that there is a relationship between moral panic and the sense of material precariousness, without which it is impossible to understand the widespread receptiveness of people to such panics. But talking about material precariousness takes us into other territory, and even those who think of themselves as single-issue activists should be interested in these related questions.

The international financial institutions (IFIs)—the World Bank and the International Monetary Fund (IMF)—have recently become quite interested in LGBTIQ rights, and many sexual orientation and gender identity (SOGI) advocates are beginning to engage with these institutions to inform the kinds of projects that they are beginning to undertake. But do the IFIs understand the relationship between material precariousness and moral panic? Do they understand their own implication in producing the circumstances of material precariousness that societies experience? The IMF has recently produced an IMF 'It Gets Better' video that features IMF LGBT employees speaking about their own experiences of being gay, coming out, etc.,<sup>2</sup> but there is almost no acknowledgement in that video (how can there be?) of the ways in which the IMF doesn't make things better for lots of people in lots of places. There is also a spoof video now — the 'IMF: It Gets Better (Pinkwashing Version)'.<sup>3</sup> I would encourage you to watch both.

The broader question that emerges from these recent engagements — and I pose this as a last, and perhaps more practical, question — is how do, how should, how can SOGI advocates engage with international institutions that might be part of the problem? What kinds of power should we engage with? And on what terms?

“How do, how should, how can SOGI advocates engage with international institutions that might be part of the problem?”

#### Endnotes

<sup>1</sup> The following text is a transcription from the opening thoughts that Rahul Rao shared in the Symposium on 5 March 2015. We thank Dr Rao for authorising their reproduction here.

<sup>2</sup> See [www.youtube.com/watch?v=rwuR85gRjnk](http://www.youtube.com/watch?v=rwuR85gRjnk) (accessed 21 August 2015).

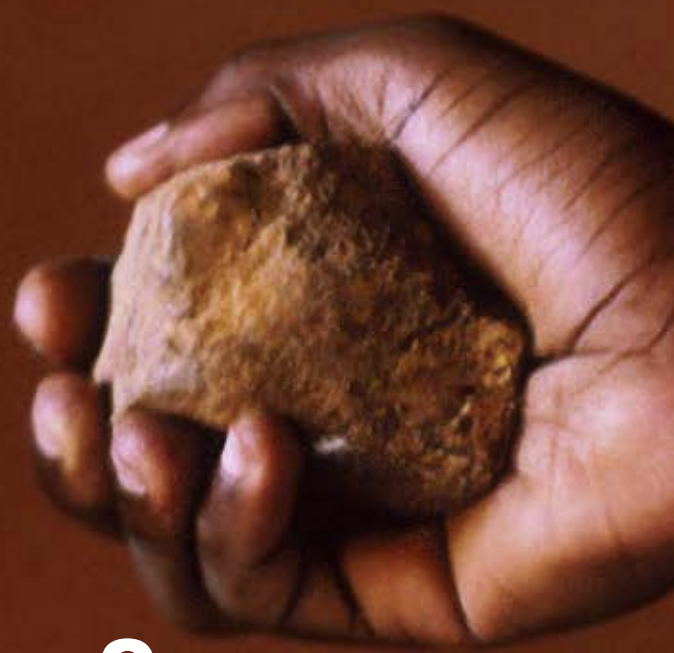
<sup>3</sup> [www.youtube.com/watch?v=SZ00OGUgEu4](http://www.youtube.com/watch?v=SZ00OGUgEu4) (accessed 21 August 2015).

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# How Useful is the Law for Attaining Sexual and Gender Justice?



KAY LALOR, ARTURO SÁNCHEZ GARCÍA AND  
ELIZABETH MILLS

**T**he articles in this section are organised around the question ‘how useful is the law for attaining sexual and gender justice?’ There is no doubt that a wide spectrum of individuals, organisations and institutions currently work at a local, national and transnational level through legal processes that aim towards the realisation of sexuality and gender justice for diverse groups. Yet as the articles in this section explore, the role of the law in these struggles is complex: a claim to human rights or to constitutionally guaranteed rights protections may be used to challenge unjust practices or to demand protection (Paiva, this section); but just as law is able to confer citizenship and promote equality, it can also work to exclude or marginalise those most in need of protection (Muranda, this section).

In questioning the frequently ‘taken for granted’ usefulness of legal processes to attain sexual and gender justice, the contributions in this section reveal how legal processes are interwoven in geographical and historical locations. Law, it is suggested, can operate in multiple different registers, as both a means by which the state might reinforce its own power, but also as a register in which this operation of state power can be made visible or challenged. As Iñaki Regueiro De Giacomini (in this section) comments:

law gives us resources to translate social claims into a structure, an order within an already defined structure. Law functions at the same time as a tool to maintain the status quo of a community... but there are also some exceptional and wonderful cases where law proves to be the opposite, a tool for social change.

It is this ambiguity that the articles in this section work to unpack.

This section sets up a dialogue that speaks, on the one hand, to the relationship between law, sexual and gender justice and state power and, on the other hand, to the role of law in entrenching social and economic marginalisation. In reflecting on how the law can be constructively utilised to promote social justice, contributions in the first part of this section reveal a range of legal tools including: lawyers allied to social causes; political channels to intervene in the legislative and judicial branches of the government; and practical avenues for accessing and influencing legal processes. In using these legal tools, sexual and gender justice activists have, in some instances, been able to successfully pursue inclusion in and recognition by the state.

In analysing the human rights of trans women in Malaysia, **Aston Paiva** interrogates the Islamisation of legal consciousness in Malaysia and the transformation of a *legal culture*<sup>1</sup> that evolved into the criminalisation of transgender rights. Paiva details the work of Justice for Sisters and in particular the way in which power can operate unevenly across multiple jurisdictions –

in this case the various Malaysian states – to create an environment of uncertainty and persecution. The way in which citizens are able to navigate legal cultures depends upon the tools that are available to engage with the particularities of the state and the intersecting concerns that a group may seek to address. In Malaysia, we see how Justice for Sisters called upon constitutionally guaranteed protections to challenge Syariah (also Sharia - Islamic legal) provisions that had been used to harass, persecute and arrest transgender women. In this case therefore, the available legal tools were sufficient to begin to challenge the prevailing legal culture and the ground-breaking Court of Appeal judgment that upheld the constitutional rights of trans women was firmly rooted in a rich body of case law from Malaysia and elsewhere.

Sharing her long (and lonely) history of activism in Cameroon **Alice N’Kom** reflects on her many years of practising law in Cameroon and her efforts to challenge homophobic laws. In Cameroon, as with the persecution of trans women in Malaysia, homosexuality appeared on the political scene fairly recently, and became the target of the defence of cultural authenticity against a fictitious Western-led campaign to undermine the sovereignty of post-colonial states. The criminalisation of homosexuality in Cameroon, Alice N’Kom tells us, reflected the unfettered exercise of political power by the executive, openly disregarding the country’s own constitution and formal commitments to promoting international human rights agreements. Both N’Kom and Paiva highlight the importance of using the political and

legal tools that are available; but they also reflect on the danger of legal disempowerment, when citizens are discouraged from or unable to use established legal tools, including constitutional precepts or penal procedures, to defend themselves or others against the arbitrary misuse of power. This ‘legal disempowerment’ enables the state to entrench its political power, and in doing so, sets up a vicious cycle of legal disenfranchisement.

Both N’Kom and **Iñaki Regueiro De Giacomi**, speak to their sense of acting as ‘judicial operators’ in order to disrupt this cycle and fight for legal empowerment. ‘Judicial operators’ are those who, as Iñaki Regueiro De Giacomi suggests with reference to Argentina, ‘use the law and the system, searching for justice in our day to day’. N’Kom’s and Regueiro De Giacomi’s dialogues, along with Paiva’s reflections on Malaysia, all highlight the law’s lack of neutrality. Legal processes do not operate in a historical, social or political vacuum, and law remains a performative act ‘from which we cannot escape responsibility’ (Cornell 1992), embedded in assumptions about society, culture and

▲ Various weapons have been used against people identified as LGBTQI in Uganda, after it criminalised same-sex acts in 2014. Some of those suspected of being LGBTQI describe being stoned by homophobic and transphobic communities.

“Law is of little use in attaining sexual and gender justice if it is unable to address the wider socio-economic exclusion, marginalisation and discrimination that accompany restrictive or exclusionary laws and policies.”

values (see Savigny cited in Cotterrell 1992: 24). And as Walter Mignolo (2009) reminds us, even the human rights upon which claims for justice are often based, are themselves the creations of particular political and historical narratives. This historical, social and cultural context of law and rights plays a significant role in its effectiveness in achieving sexual rights.

When Iñaki Regueiro De Giacomi was asked to describe the success of the Argentinean process, to share strategies that could be replicated in other contexts, he refused, insisting on the historical and geopolitical specificities of each of the struggles that we witness. He went on to explain that the experience of success depends on political momentum: in the case of Argentina, it especially depended upon the capacity of a well-organised civil society to recognise them and profit from this political momentum.

With De Giacomi's reflections in mind, the articles that follow this dialogue sound a note of caution. This caution is echoed by **Rahul Rao's** introductory observation that tools to pursue social justice and recognition by the state can also be co-opted by the state to reinforce its political legitimacy and authority (while trampling over other rights). Contributions in the second part of this section therefore problematise the notion that legal reforms on gender and sexuality are an adequate measure of meaningful progress in the political life of a nation.

In particular, the contributions by Shereen El Feki and Javaid Rehman, Silvana Tapia Tapia and Ciara O'Connell all explore the way in which different narratives inform the design and implementation of law in various ways. As this Collection came together, a powerful myth resurfaced, suggesting that religion was the greatest threat to freedom and sexual rights. Ideas about Islam, in particular, have gained currency as they have come to circulate the globe as global threats (at least in Western countries) against some of the great legal achievements of liberal democracies.<sup>2</sup> In this Collection, **Shereen El Feki** and **Javaid Rehman** present a careful distinction between the knowledge that religious texts produce – particularly with respect to Qur'anic readings that embrace sexual diversity and sexual pleasure – and the different ways that patriarchal regimes have imposed their authority through Islamic structures and institutions to ensure the expansion of state power. In particular, El Feki and Rehman discuss the 'unholy alliance' between politics and religion in some Islamic states, in which religion is operationalised to support embedded patriarchal and state power. The resulting legislation, which is justified through reference to Sharia, is often repressive of sexual rights. El Feki and Rehman offer an important counter-narrative to the way in which Sharia is used by entrenched power, arguing for a

reading of the Qur'an that embraces sexual diversity and sexual pleasure. More open readings of *fiqh* have been advanced, both by contemporary groups and past Islamic societies.<sup>3</sup> It is these counter-narratives that this article seeks to explore.

El Feki and Rehman raise important questions about the relationship between state power, law and sexual rights and the way in which particular narratives can be co-opted in the service of the state and in particular in the expansion of state power. In the same way that rights must be thought of as products of a specific historical trajectory, the state cannot be imagined outside its specific expression of authority. **Silvana Tapia Tapia** explores this theme, addressing the way in which incarceration and criminalisation become instruments for the protection of women's rights in Ecuador; the reliance on imprisonment reflects the state's attempt to 'protect' women from gender-based violence. While highly problematic as a response to addressing gender violence, there is a danger too in reframing feminist demands (for gender equality and freedom from violence) through the discourse of criminal law. This reframing enables the creation of hegemonic legal discourses that can be subsumed and rationalised by the narratives of the state. **Ciara O'Connell** explores similar themes in an international context, exploring the way in which gender can be marginalised even in those cases that address women's reproductive rights, and in doing so, an opportunity to demand state action to address the deeper causes of gender-based violence or marginalisation is missed.

In looking at the ways law can, and cannot, be used for ensuring the realisation of sexual and gender justice, the contributions in this section reveal the intricate relationship between law and the context in which it operates and, in particular, the role of the state and the way in which citizens use legal tools to engage in dialogue with the state. The contributions that make up the final part of Part 2 point to the importance of understanding the multifaceted nature of both states and legal frameworks. Laws affect the vitality and freedoms of citizens, but, in addition to regulating gender and sexuality, they also regulate service delivery and affect whether resources – such as education, health care and housing – are or are not made available to people on the basis of their gender and sexuality. When laws discriminate against people on the basis of their gender or sexuality, they have a tangible effect not only on who and how people can embody and perform their identity, but they also affect whether they can access welfare benefits that address intersecting forms of poverty.

Thus, the law has social and economic dimensions that, when limiting people's sexual rights, might result in deepening levels of poverty among these



marginalised groups. Law is of little use in attaining sexual and gender justice if it is unable to address the wider socioeconomic exclusion, marginalisation and discrimination that accompany restrictive or exclusionary laws and policies. Several of the articles address this issue directly. For example, **Nisha Ayub**, while acknowledging the importance of recent legal victories in Malaysia and the need for further reform, also highlights the wider effects of unclear and unevenly applied laws. Such laws create an ‘un-enabling’ environment for transgender people in Malaysia, in which a lack of certainty about the law, about one’s acceptance by society and about one’s capacity to move through space without risking harassment or arrest is often accompanied by a lack of employment and homelessness.

**Naome Ruzindana** also reflects on the effects of marginalisation across a number of different legal contexts. She notes the precarity that LGBT people can face – often resulting in job losses, evictions, expulsion from education as well as violence, harassment and intimidation. She highlights the way in which this precarity often presents individuals with a stark choice: to either hide their sexual orientation or gender identity, or to leave their homes and seek refugee status elsewhere. However, those who are compelled to leave do not necessarily escape discrimination, marginalisation or poverty – a culture of increased hostility towards refugees in Europe and elsewhere can often result in further injustices and socioeconomic exclusion for those who are seeking asylum.

What is clear, therefore, is the way in which questions of law or of rights need also to pay careful attention to questions of political economy in the context of sexual rights. A lack of attention to these questions, as **Svati Shah** suggests, is part of a process of depoliticisation in which discourses of ‘rescuing’ victims from everything from rights violations to human trafficking erase the temporality and materiality of the individuals involved: they become ‘just’ a victim and, as Shah argues, the connections between material needs, poverty, sexuality and state power are lost.

**Tatenda Muranda’s** article brings together the themes addressed throughout this section. She addresses the failure of law and policy in the field of HIV/AIDS in relation to women who have sex with women (WSW). This critique is situated within a context of structural imbalance, narratives of risk and safety and both case law and policy on access to health care. She notes that:

Scripting WSW out of public discourses on what constitutes African womanhood, female sexuality and vulnerability to HIV/AIDS has undermined their ability to fully realise their

rights to non-discrimination and health despite clear Constitutional protections. This proves that social perceptions and ideologies remain some of the most powerful antagonistic forces in the realisation of rights in South Africa. Despite claims that rights are ‘interdependent, indivisible and mutually supporting’ (Chirwa 2003) they remain volatile normative concepts, and as such they are incomplete, partial and subject to revision over time.

Sexual rights alone – whether supported by constitutional guarantees or international agreements – are unlikely to be sufficient unless they are situated within the wider, material, political and socioeconomic contexts in which they operate. The contributions in this section unpack the myriad ways in which different contexts impact upon rights, upon the usefulness of law for achieving sexual and gender justice and upon the limits of law in achieving social and economic justice. The insights that they offer do not suggest that a wholesale abandonment of the law or of legal processes is needed. Instead, as Muranda suggests, in order to ‘get it right’, a reflexive and critical approach to the effect of law and state power on those who are rendered vulnerable or invisible by its processes is urgently required.

“In order to ‘get it right’, a reflexive and critical approach to the effect of law and state power on those who are rendered vulnerable or invisible by its processes is urgently required.”

#### Endnotes

<sup>1</sup> The term legal culture is used to describe the ways in which individuals who are exposed to the law and legal systems conceive them, including the way they relate to their authority (Domingo 2004).

<sup>2</sup> For a critical engagement with this claim, see Puar (2007).

<sup>3</sup> *Fiqh* refers to the ‘laws and administrative practices which make up Islamic jurisprudence and are used to apply and enforce the *Sharia*’ – El Feki and Rehman in this section.

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▲ 36-year-old Erina in Kuala Lumpur, Malaysia.

# The Human Rights of Transwomen in Malaysia

ASTON PAIVA

## 1 Brief history of Malaysia

Malaysia is a federation comprising 13 states (Johore, Kedah, Kelantan, Malacca, Negeri Sembilan, Pahang, Penang, Perak, Perlis, Sabah, Sarawak, Selangor and Trengganu) and three federal territories (Kuala Lumpur, Labuan and Putrajaya).

Historically, Malaysia's ethnic Malays and other indigenous populations lived in village societies and believed in animism. Animism was overlaid by Hinduism and later subsumed by Islam in the fifteenth century, spread by Indian and Arab traders in the then regional trading port of Malacca.

Before the coming of the British in the eighteenth century, the sultans in each state were the heads of the religion of Islam and the political leaders in their states, which were Islamic; the sultans were Muslims, their subjects were Muslims and the law applicable in the states was Muslim law. Under such law, the sultan was regarded as God's representative on earth. He was entrusted with the power to run the country in accordance with Islamic law.<sup>1</sup>

When the British came, they imposed a system of indirect rule on the states with sultans through a series of treaties. In some states, a Council of State was set up to advise the sultan. In other states, the rulers accepted the office of a British resident who had exclusive authority over the administration of the state. These states were effectively protectorates. This period also saw an influx of workers to Malaya (as Malaysia was then known) from China and India. The migrants brought with them their religions and belief systems: Buddhism, Christianity, Confucianism, Hinduism, Sikhism and Taoism.

Thus, under British rule, the sultans ceased to be regarded as God's representative on earth and each was considered a sovereign within his territory. By ascribing sovereignty to a human, the divine source of legal validity was severed and the British turned the system into a secular institution. All laws, including state-enacted Islamic laws, had to receive their validity through a secular fiat<sup>2</sup> enacted by a legislature, which in post-independent Malaysia could comprise elected representatives of a variety of religious affiliation or ethnicity.

In 1956, a Constitutional Conference was held in London where an agreement was reached with the British government that full self-government

and independence should be proclaimed by August 1957. The Reid Commission<sup>3</sup> was appointed to make recommendations for a suitable constitution for the nation. These recommendations (Reid Commission 1957: 5, 7) formed the basis of the Federal Constitution and the Federation of Malaya gained independence on 31 August 1957. The states of Sabah and Sarawak gained independence in 1963 with the formation of the Federation of Malaysia. Malaysia consisted of the then Federation of Malaya, Sabah, Sarawak and Singapore. Singapore left the Federation of Malaysia in 1965.

The Federal Constitution ('the Constitution') established the following features in Malaysia (Suffian 1988: 10):

- A federation (Article 1)
- A constitutional monarchy (Articles 39, 40 and 43)
- A parliamentary democracy (Articles 44 and 62(3))
- Islam as the religion of the federation (Article 3(1), but it does not establish Malaysia as a theocracy (Articles 3(4) and 162) and expressly guarantees freedom of religion (Article 11))
- Provision for the rule of law (Article 4)
- An independent judiciary (Part IX).

At 2010, the demographics of Malaysia were estimated as follows (CIA 2010):

*Ethnicity:* Malay 50.1 per cent, Chinese 22.6 per cent, indigenous 11.8 per cent, Indian 6.7 per cent, other 0.7 per cent, non-citizens 8.2 per cent.

*Religion:* Muslim 61.3 per cent, Buddhist 19.8 per cent, Christian 9.2 per cent, Hindu 6.3 per cent, Confucianism, Taoism, other traditional Chinese religions 1.3 per cent, other 0.4 per cent, none 0.8 per cent, unspecified 1 per cent.

## 2 Key constitutional provisions

The material portion of Article 3 of the Constitution reads as follows:

Article 3. Religion of the Federation.

(1) Islam is the religion of the Federation; but other religions may be practised in peace and harmony in any part of the Federation.

...

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(4) Nothing in this Article derogates from any other provision of this Constitution.

Article 4(1) declares the Constitution to be the supreme law of the Federation while articles 5 to 13 (Part II) guarantee the following fundamental liberties respectively:

- Life and personal liberty
- Slavery and forced labour to be prohibited
- Protection against retrospective criminal laws and repeated trials
- Equality and non-discrimination
- Freedom of movement
- Freedom of speech, assembly and association
- Freedom of religion
- Education rights
- Right to property.

“These legal and institutional reforms have accompanied an ongoing public debate in Malaysia about the role of Islam in Malaysian legal and political life.”

Article 74(2) (read together with the Ninth Schedule List II Item 1) empowers State Legislatures to legislate on matters pertaining to the religion of Islam and this includes: ‘creation and punishment of offences by persons professing the religion of Islam against precepts of that religion’.

As defined by Article 160(2) of the Constitution, the expression ‘law’ whenever used in the Constitution ‘includes written law, the common law [of England]... and any custom or usage having the force of law’. Thus, *substantive Islamic law* is not part of what constitutes ‘law’

under the present constitutional and legal framework of Malaysia.<sup>4</sup>

### 3 The Islamisation of Malaysia and popular legal consciousness

The ‘Islamisation race’ (Sundaily 2005) or the Islamisation of legal consciousness in Malaysia began in the 1960s. Farish A. Noor identifies the unexpected victory of Parti Islam Se-Malaysia (PAS) (Pan-Malaysian Islamic Party) in Kelantan and Terengganu in the 1959 elections as a key catalyst in this process (*ibid.*). The government of the day, led by Tunku Abdul Rahman and United Malays National Organisation (UMNO), sought to respond with a series of financial, legal and institutional measures intended to demonstrate its own Islamic credentials. These measures, implemented over a number of decades, included a 1976 constitutional amendment<sup>5</sup> that replaced the expressions ‘Muslim’, ‘Muslim religion’ and ‘Muslim court’ wherever they appeared in the Constitution,

with the words ‘Islamic’, ‘religion of Islam’ and ‘Syariah [Shariah] court’ respectively, and a 1988 constitutional amendment<sup>6</sup> separating Syariah and civil courts, and removing cases that fell under the jurisdiction of the Syariah courts from that of the civil courts (Harding 2012: 230–31).

These legal and institutional reforms accompanied an ongoing public debate in Malaysia about the role of Islam in Malaysian legal and political life. This debate came to a head in 2001 when Mahathir Mohammad, then head of UMNO, declared that Malaysia was an ‘Islamic state’. The impact of these debates and reforms is significant, as Professor Tamir Moustafa notes:

In all of these amendments, the shift in terminology exchanged the *object of the law* (Muslims) for the purported *essence of the law* (as ‘Islamic’). This semantic shift, I argue, is a prime example of what Erik Hobsbawm calls ‘the invention of tradition’. The authenticity of the Malaysian ‘shariah’ courts is premised on fidelity to the Islamic legal tradition. Yet, ironically, the Malaysian government reconstituted Islamic law in ways that are better understood as a subversion of the Islamic legal tradition. That distinct form of Anglo-Muslim law, it must be remembered, is little more than a century old. But every reference to state ‘fatwas’ or the ‘shariah courts’ serves to strengthen the state’s claim to embrace the Islamic legal tradition. ...It is with the aid of such semantic shifts that the government presents the syariah courts as a faithful rendering of the Islamic legal tradition, rather than as a subversion of that tradition. In this regard, a parallel may be drawn to nationalism. *Just as nationalism requires a collective forgetting of the historical record in order to embrace a sense of nation, so too does syariah court authority require a collective amnesia vis-à-vis the Islamic legal tradition.*

*This semantic shift was likely an effort to endow Muslim family law and Muslim courts with a religious personality in order to brandish the government’s religious credentials.* The shift in terminology came during a period when the *dakwah* (religious revival) movement was picking up considerable steam in Malaysian political life. The ruling UMNO faced constant criticism from PAS President Asri Muda to defend Malay economic, political, and cultural interests through the early 1970s.

...

During [Mahathir’s] 22 years of rule, the religious bureaucracy expanded at an unprecedented rate, and aspects of Islamic law were institutionalized to an extent that would have been unimaginable in the pre-colonial era. New state institutions proliferated, such as the Institute of Islamic Understanding (Institut Kefahaman Islam Malaysia, IKIM) and the International Islamic University of

Malaysia (IIUM). Primary and secondary education curricula were revised to include more material on Islamic civilization, and radio and television content followed suit. But it was in the field of law and legal institutions that the most consequential innovations were made (Moustafa 2014).

All these rapid changes coupled with scant regard for legal education in primary and secondary schools or in the media have resulted in an atrophied legal consciousness among Malaysian Muslims. In a survey conducted by Professor Moustafa on 1,043 Malaysian Muslims in 2009 (Moustafa 2013: 179), it was found that 78.5 per cent of respondents agreed that '[e]ach of the laws and procedures applied in the [Malaysian] shari'a courts is clearly stated in the Qur'an'. This is manifestly incorrect as all laws, including state-enacted Islamic laws, are enacted by a secular institution (the State Legislature) after deliberation by elected assembly persons, who vary in religion and ethnicity.

The disheartening consequence of these misconceptions are incisively stated by Professor Moustafa:

These misconceptions are not merely significant in a religious sense. Because Islamic law is used extensively as an instrument of public policy, popular misconceptions about basic features of Islamic jurisprudence have significant implications for democratic deliberation on a host of substantive issues, of which women's rights is just one important example. When the public understands the shari'a courts as applying God's law unmediated by human influence, people who question or debate those laws are likely to be viewed as working to undermine Islam. Indeed, it is the presumed divine nature of the laws applied in the shari'a courts that provides the rationale for criminalizing the expression of alternative views in the Shari'a Criminal Offenses Act. As a result, laws concerning marriage, divorce, child custody, and other issues critical to women's well-being are difficult to approach as matters of public policy.

...

One effect of this situation is that Islamic law is often used to close down debate, to strengthen conservative positions or to discredit those seeking change (Moustafa 2013: 180, 185).

## 4 The criminalisation of gender identity and gender expression and the Negeri Sembilan constitutional challenge

Between 1985 and 2012, every state and the federal territories introduced Syariah (Islamic law) penal enactments that criminalised male persons who 'wear a woman's attire' or 'pose as a woman' in any

public place. Some states provide an exception: that dressing or posing as a woman will only be punishable if done for 'immoral purposes' or 'without reasonable grounds'. These laws were enacted on the basis of being an 'offence by persons professing the religion of Islam against precepts of that religion'. Malaysia thus became one of the few countries in the world that explicitly criminalises transgender people.

Between 2005 to 2014, numerous trans women were being repeatedly arrested, detained and prosecuted by the religious authorities for dressing as a woman in the state of Negeri Sembilan. Most were arrested while engaging in routine activities in public e.g. socialising, eating and working. In the course of their arrest and detention, many were subjected to cruel, degrading and humiliating treatment, which included being taunted and insulted, being beaten and sexually molested, and being made to strip in full view of male religious officers (see also Human Rights Watch 2014).

Section 66 of the Syariah Criminal Enactment 1992 (Negeri Sembilan) (section 66) reads:

Any male person who, in any public place wears a woman's attire or poses as a woman shall be guilty of an offence and shall be liable on conviction to a fine not exceeding one thousand ringgit (approx. \$270) or to imprisonment for a term not exceeding six months or to both.

In early 2011, three affected transwomen filed the first ever constitutional challenge to a state-enacted Islamic law on the grounds of being inconsistent with fundamental liberties guaranteed by the Constitution. They contended that section 66 affected the following rights:

- Right to live with dignity and right to livelihood (Article 5(1))
- Equal protection of the law (Article 8(1))
- Right to non-discrimination on the ground of gender (Article 8(2))
- Freedom of movement (Article 9(2))
- Freedom of expression (Article 10(1)(a)).

They were unsuccessful at the High Court in October 2012 and appealed to the Court of Appeal. After four months of deliberation, the Court of Appeal unanimously allowed their appeal in November 2014.<sup>7</sup> The Court found a violation of all contended rights. In summary, the Court held:

(a) Section 66 of the Enactment is inconsistent with art. 5(1) of the Constitution as it deprives the appellants of their right to live with dignity. Section 66 is irreconcilable with the existence of the appellants and all other [Gender Identity Disorder (GID)] sufferers. A law that punishes the gender expression of transsexuals degrades

and devalues persons with GID in our society. Furthermore, 'life' in art. 5(1) means more than mere animal existence; it also includes such rights as livelihood and the quality of life. The effect of section 66 is that it prohibits the appellants and other GID sufferers who cross-dress from moving in public places to reach their respective workplaces: paras 44, 46, 48 and 50.

(b) The state and section 66 of the Enactment simply ignore GID sufferers such as the appellants and unfairly subject them to the enforcement of law. The appellants should not be treated similarly to normal Muslims yet section 66 provides for equal treatment and does not provide for any exception for sufferers of GID. The inclusion of persons suffering from GID under section 66 discriminates against them. Therefore, section 66 is inconsistent with art. 8(1) of the Constitution as it is discriminatory and oppressive, and denies the appellants the equal protection of the law: para 54.

(c) Section 66 is discriminatory on the grounds of gender and, therefore, violates art. 8(2) of the Constitution as it subjects male Muslim persons like the appellants to an unfavourable bias *vis-à-vis* female Muslim persons: paras 58 and 59.

(d) Section 66 of the Enactment is explicit in criminalising any Muslim man who wears a woman's attire or poses as a woman in any public place. Section 66 denies the appellants and sufferers of GID the right to move freely in public places. In effect, the appellants and other male Muslim sufferers of GID will never be able to leave their homes and move freely in Negeri Sembilan without being exposed to being arrested and punished. As such, section 66 is inconsistent with art. 9(2) of the Constitution: paras 65, 66 and 67.

(e) A person's dress, attire or articles of clothing are a form of expression which is guaranteed under art. 10(1)(a) of the Constitution. Section 66, a state law that criminalises any male Muslim who wears a woman's attire or who poses as a woman in public directly affects the appellants' right to freedom of expression in that they are prohibited from expressing themselves: paras 73, 75 and 76.

Crucially, and for the first time, the Judiciary states unambiguously after having considered article 3(4), that the position of Islam as the religion of the Federation remains 'subject to... the fundamental liberties provisions as enshrined in Part II of the Federal Constitution' (paras 30 and 31).

This pronouncement grants positive impetus to constitutional adjudication and the protection of fundamental liberties in Malaysia at a time of increased enforcement of State enacted Islamic laws to prohibit freedom of speech and expression<sup>8</sup> and freedom of religion,<sup>9</sup> and a marked imposition of Islamic

injunctions, as dictated by the state(s), on the civil and political life of non-Muslims,<sup>10</sup> Muslims<sup>11</sup> and even persons who no longer profess the religion of Islam.<sup>12</sup>

#### 4.1 Principles of constitutional interpretation adopted by the Court of Appeal

In reaching its decision, the Court of Appeal was guided by the principles of constitutional interpretation laid down by a number of Malaysian apex court decisions.<sup>13</sup> There is nothing new about these principles and they are espoused by various other apex courts of different jurisdictions, and crisply detailed by the Privy Council in *Reyes v The Queen* [2002] 2 WLR 1034:

When (as here) an enacted law is said to be incompatible with a right protected by a Constitution, the court's duty remains one of interpretation. If there is an issue (as here there is not) about the meaning of the enacted law, the court must first resolve that issue. Having done so it must interpret the Constitution to decide whether the enacted law is incompatible or not... As in the case of any other instrument, the court must begin its task of constitutional interpretation by carefully considering the language used in the Constitution. But it does not treat the language of the Constitution as if it were found in a will or a deed or a charterparty. *A generous and purposive interpretation is to be given to constitutional provisions protecting human rights. The court has no licence to read its own predilections and moral values into the Constitution, but it is required to consider the substance of the fundamental right at issue and ensure contemporary protection of that right in the light of evolving standards of decency that mark the progress of a maturing society...* In carrying out its task of constitutional interpretation the court is not concerned to evaluate and give effect to public opinion... [Emphasis added]

Thus, this process of constitutional interpretation protects rights of minorities 'social outcasts' and the marginalised, who may not always enjoy the support of public opinion or be able to access their rights through the democratic process.<sup>14</sup>

Equally important was the Court of Appeal's adoption of the Indian Supreme Court case of *National Legal Services Authority and Others v Union of India and Others* [2014] 4 LRC 629. In the said case, the Indian Supreme Court found that:

Gender identity lies at the core of one's personal identity, gender expression and presentation and, therefore, it will have to be protected under art. 19(1)(a) of the Constitution of India (on freedom of speech and expression): at [66]

Recognition of one's gender identity lies at the heart of the fundamental right to dignity. Gender constitutes the core of one's sense of being as

well as an integral part of a person's identity. Legal recognition of gender identity is part of right to dignity and freedom guaranteed under article 21 of the Constitution of India (on life and personal liberty): at [67] and [68].<sup>15</sup>

Thus, this ground-breaking judgment is embedded in a rich body of case law from Malaysia and elsewhere.

## 5 The way forward: empowerment, activism and engagement

### 5.1 Empowerment

With four decades of extensive government propaganda and stifling Islamisation policies, Malaysians (particularly Muslims) now live in ignorance about their constitutional rights, of Islam and of each other's religious heritage. In present day Malaysia and given the current state of legal consciousness, there beckons a pressing and vital need for civil society to re-educate the public on the role that ought to be occupied by religion in a modern multi-religious democracy.

One of the most clear expositions on the role of religion (and Islam in particular) in a modern democracy comes from the late great Indian Muslim professor Asaf Fyzee from 1959. The learned Professor writes:

Democracy insists that the State is one and that its laws are of equal application. Laws are impersonal and objective rules which the state applies to all its citizens without exception. But religion is based on the personal experience of great teachers; its appeal is personal, immediate and intuitive. While its laws and its ritual and its trappings can be of general application in a community, the inner core of belief is exclusively personal. No state can compel religious allegiance as it can enforce its laws. Hence the well-known dicta of the law that before the law, all religions are equal;... *Thus there is a clear difference between a rule of law which can be enforced by the state, and a rule of conscience which is entirely a man's own affair.*

...

*The first task is to separate logically the dogmas and doctrines of religion from the principles and rules of law. To me it is an axiom that the essential faith of man is something different from the outward observance of rules; that moral rules apply to the conscience, but that legal rules can be enforced only by the state. Ethical norms are subjective; legal rules are objective* (Fyzee 1959: 40, 48). [Emphasis added]

Back in Malaysia, Justice for Sisters and various other civil society organisations have been tirelessly advocating for equality, respect for human dignity and the use of reason by the state(s) in solving modern day dilemmas. In an effort to raise public awareness, we have found some success by organising frequent forums, seminars and outreach sessions for the

public and the transgender community. And with the assistance of the media (the internet, radio and print), we are able to widely and steadily disseminate ideas and information on Malaysia's political structure and the democratic processes that all Malaysians can avail themselves to when rights violations take place.

With an underlying focus on common human values – understanding, respect for human dignity, tolerance, compassion and peace – people become more concerned about their similarities instead of differences. From our experience, people stop looking at things in black and white: 'human rights vs Islam', 'Muslim vs non-Muslim', 'gay vs straight'. There would instead be real concern over the persecution and violence suffered by everyday Malaysians and how their suffering can be relieved.

The Court of Appeal's decision on section 66 is also a valuable tool for empowerment. It acts as a reminder to all Malaysian Muslims that they are entitled to challenge State-enacted Islamic laws on the ground of being inconsistent with fundamental liberties; liberties which are constitutionally guaranteed to all Malaysians regardless of religion.

### 5.2 Activism

In terms of law and policy, we have engaged with the legislature, executive departments and have gone to the courts to have a law declared unconstitutional.

We have met with lawmakers and policymakers, enlightened them about the effect of laws that criminalise gender expression and gender identity and provided them with historical, medical and sociological evidence on transgender persons. We have generally received favourable support from opposition members of legislatures including Muslim assemblypersons. While some Muslim assemblypersons still harbour disagreement with certain attire worn by transgender persons, nonetheless they remain resolute about the repeal of any law that criminalises gender expression or identity. This remains an ongoing effort with plans for a comprehensive equality legislation to deal with the stigma and discrimination faced by minority members of society in Malaysia.

More recently, meetings between various civil society groups and the Human Rights Commission of Malaysia (SUHAKAM) (a statutory body) in 2014 have led to a joint report published by SUHAKAM and the United Nations Country Team, Malaysia, where the Islamic

“With four decades of extensive government propaganda and stifling Islamisation policies, Malaysians (particularly Muslims) now live in ignorance about their constitutional rights, of Islam and of each other's religious heritage.”



religious authorities were criticised. This is a very positive and bold step. The report states:

“We have learnt that **communication and dialogue between all members of society remain vital** for reducing stigma and discrimination among vulnerable communities.”

Operations or raids are mounted periodically by Islamic religious agencies to arrest and prosecute Muslim transgenders contravening cross-dressing and indecent public behaviour laws. These arrests are often reported by the media in sensational terms and accompanied by inappropriate images of those arrested; it appears the intended aim is to cause deep embarrassment and shame. *Public statements by Muslim religious leaders and senior government officers of religious affairs department such as those denouncing transgenders and issuing recommendation that are not evidence based to 'rehabilitate' transgenders further magnifies already prevalent stigma associated with mak nyahs.* Such pronouncements do not aid the Department of Islamic Development in their strategy to reach out to the *mak nyah* community offering pathways to employment, self-development and HIV education (UN and SUHAKAM 2015: 23). [Emphasis added]

### 5.3 Engagement

Throughout 2013 and 2014, Justice for Sisters engaged with an international human rights organisation, Human Rights Watch, which published a 73-page report on the human rights abuses against transgender people in Malaysia (Human Rights Watch 2014). This remains an extremely valuable advocacy tool with government officials and the courts.

Looking to the future, we have plans to engage with multinational corporations in Malaysia to assist them with making their employment policies LGBT friendly or encouraging them to do so. We are of the view that if foreign multinational corporations can have no restrictions to transgender persons in their workforce, that would act as a huge incentive for states to repeal laws that criminalise gender expression. Economic considerations should never be underestimated.

Lastly, certain media agencies in Malaysia do still spread sensational and stereotypical news about transgender people. This often acts as a catalyst for further stigma and discrimination. We plan to engage with some of these media agencies in order to curb these unethical forms of reporting.

## 6 Conclusion

We have, for the last four years, noticed a marked difference among the urban population in their opinions of trans women; where once they were considered sexual deviants that ought to be shunned,

now there is certain acceptance and concern about them and their plight and an increase in public support for the trans women of Malaysia. We noticed that the more people from different communities learnt about one another, the more empathetic they became towards one another. We have learnt that communication and dialogue between all members of society remain vital for reducing stigma and discrimination among vulnerable communities.

Through our eyes in Malaysia, we see the key issue for the *mak nyahs* of Malaysia and transgender people worldwide to be one of *dignity*: can you punish them for an attribute of their nature that they did not choose and cannot change? No civil or humane government can ever, or should ever, answer that in the affirmative. History shows that persecution of a minority has only ever led to a fractured society, a failed state or a war crimes tribunal.

We still have a long way to go in Malaysia before we achieve an optimum state of human rights protection for the transgender community. For now, we hope to learn from the experience of others and sincerely hope that you may find some light in our experience.

### Endnotes

<sup>1</sup> *Che Omar Bin Che Soh v Public Prosecutor* [1988] 2 MLJ 55 at 56F – H (left), SC.

<sup>2</sup> *ibid.* at 56FH (left) – B (right).

<sup>3</sup> The Commission consisted of Lord William Reid (a Lord of Appeal), Sir Ivor Jennings (a Cambridge jurist), Sir William McKell (a former governor-general of Australia), B. Malik (a former chief justice in India) and Abdul Hamid (a judge in Pakistan).

<sup>4</sup> See also: *Che Omar Bin Che Soh v Public Prosecutor* [1988] 2 MLJ 55 at 57A – C (left), SC.

<sup>5</sup> *Constitution (Amendment) Act 1976*, ss. 44 and 45, w.e.f. 27-8-1976.

<sup>6</sup> *Constitution (Amendment) Act 1988*, s. 8, w.e.f. 10-6-1988.

<sup>7</sup> *Muhamad Juzaili Mohd Khamis & Ors v State Government of Negeri Sembilan & Ors* [2015] 1 CLJ 954. Full judgment also available at [www.kehakiman.gov.my/directory/judgment/file/N-01-498-11-2012\\_jud\\_penuh.pdf](http://www.kehakiman.gov.my/directory/judgment/file/N-01-498-11-2012_jud_penuh.pdf) (accessed 5 October 2015).

<sup>8</sup> *Berjaya Books Sdn Bhd & Ors v Jabatan Agama Islam Wilayah Persekutuan & Ors* [2014] 8 CLJ 51, HC; *Jabatan Agama Islam Wilayah Persekutuan and 2 Others v Berjaya Books Sdn Bhd and 2 Others*, Court of Appeal, Civil Appeal No. WJ-01-143-04/2013, 30 December 2014, [www.kehakiman.gov.my/directory/judgment/file/WJ-01-143-04-2013.pdf](http://www.kehakiman.gov.my/directory/judgment/file/WJ-01-143-04-2013.pdf) (accessed 5 October 2015).

<sup>9</sup> *Maqsood Ahmad & 38 Ors v Majlis Agama Islam Selangor*, High Court Shah Alam, Application for Judicial Review No. 25-129-07/2014, HC (pending adjudication).

<sup>10</sup> *Titular Roman Catholic Archbishop of Kuala Lumpur v Menteri Dalam Negeri & Anor* [2010] 2 CLJ 208, HC; *Menteri Dalam Negeri & Ors v Titular Roman Catholic Archbishop of Kuala Lumpur* [2013] 8 CLJ 890, CA; *Indira Gandhi Mutho v Pengarah Jabatan Agama Islam Perak & Ors* [2013] 7 CLJ 82, HC.

<sup>11</sup> *SIS Forum (Malaysia) v Dato' Seri Syed Hamid bin Syed Jaafar Albar* (Menteri Dalam Negeri) [2010] 2 MLJ 377, HC; *Dato' Seri Syed Hamid bin Syed Jaafar Albar* (Menteri Dalam Negeri) v

*SIS Forum (Malaysia)* [2012] 6 MLJ 340, CA.

<sup>12</sup> *Joy v Federal Territory Islamic Council and Others* [2009] 1 LRC 1, FC.

<sup>13</sup> *Lee Kuan Joh v PP* [2009] 5 CLJ 631, FC; *Sivarasa Rasiah v Badan Peguam Malaysia & Anor* [2010] 3 CLJ 507, FC; *Dewan Undangan Negeri Kelantan & Anor v Nordin Salleh & Anor (I)*, [1992] 1 CLJ Rep 72, SC.

<sup>14</sup> *S v Makwayne* 1995 (S) SA 391. See also: *Boyce v The Queen* [2004] 3 WLR 786 at [28], PC; *Pinder v The Queen* [2004] 3 WLR 786 at [61], PC.

<sup>15</sup> See also: *ANN v Attorney General* [2014] 1 LRC 586, High Court Kenya.

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# Q&A Alice N'Kom in Conversation with Gatete TK

**Alice N'Kom:** All right, where do I start? With myself? With my challenges? With my battles?

**Gatete TK:** With yourself.

**ANK:** My God, first of all I am very happy to be here, and with many pretensions. I think I'm here to represent not just the homosexual problem in Cameroon, but also the homosexual problem within African countries. Because a country like Senegal, which we have always considered very modern, very respectful of human rights, also penalises homosexuality. The whole world followed the dialogue between Mr President Obama and Mr President Macky Sall on this issue, when President Obama told him 'But brother, I came here to ask you what do I do with the people being driven away from here; you put them in prison because they are gay and then they emigrate to the US. But they are active people, very productive, who make a lot of money which they send back to help their families, to help their parents. What do we do? Shall I do like you? Shall I put them in jail once they are here? One must try to do like me and to stop putting them in jail.' Unfortunately the Senegalese president did not give the answer that I could have hoped for. And we took him as a role model in the step towards modernity today! But he did not give the answer we were expecting. He replied to him: 'Ah yes, but that's America, here homosexuality is forbidden.'<sup>1</sup>

**GTK:** Society is not ready yet.

**ANK:** Society is not ready yet... well, that could be one of the answers, which was very disappointing. We all counted on Senegal's leadership to be the champion.

**GTK:** Senegal has not always been the champion?

**ANK:** But yes! Before it was, it was!

**GTK:** In human rights issues?

**ANK:** No, but Senegal was a country where the police respected you very much. The policemen didn't stop you, everyone knew it. It was the city of lights, the country that held the biggest festivals, with a rich culture, etc. It has all those many things, and yet it is now incoherent with its rights restrictions, especially today. But one cannot go to Senegal without visiting Gorée, the proof of slavery and trafficking.<sup>2</sup>

**GTK:** Is it because we did not learn from Gorée that we face now issues of discrimination?

**ANK:** There you go, discrimination. I think we have not learned yet

**Alice N'Kom** is a Cameroonian defence attorney, well known for her advocacy towards the decriminalisation of homosexuality in Cameroon. She studied law in Toulouse and has been a lawyer in Douala since 1969. At the age of 24, she was the first black woman called to the bar in Cameroon. Her work is focused in the defence civil rights work on behalf of Cameroon's marginalised lesbian, gay, bisexual and transgender (LGBT) community. In 2003 she founded Association pour la Défense des Droits des Homosexuels (ADEFHO), an association that provides juridical, judicial, material and medical help to people accused of homosexuality in Cameroon.



from Gorée. It did not give the lesson we were waiting for. Slavery, what was that? It was inequality! It was discrimination in regards to skin colour, in regards to the origins. That's what Gorée should have represented, and that's what we thought we'd find, and what we had hoped from the words of Mr President Macky Sall. He is younger. His brother and American colleague confronted him: 'What do I do with these people that you kicked out? How do we deal with it? If we agree with you, do we then need to put them in jail over there? Or would you agree with me? We don't imprison them!' And that was the question!

**GTK:** Excuse me. You speak with great passion. Because of that I would like you to first tell us about yourself. Why this passion? Who is Alice N'Kom? What motivates you? What animates you?

**ANK:** You are about to see that I am not very good at speaking about myself, but I will still talk to you about the person who set up an association called ADEFHO, the Association for the Defense of Homosexuality in Cameroon in 2003, who now defends against the world, protecting and justifying from her position the defence of such a serious and controversial issue, which has unleashed so much passion, unfortunately negative. Well, that person is called Alice N'Kom. She is 70 years old.

**GTK:** That, however, is hard to believe.

**ANK:** Oh yes, I am an African grandmother who has crossed two generations. The generation of my parents who raised me, who taught me African values, which are the same values that are found in New York and Tokyo. Those are values that are attached to the human person, because they are human beings. Those are not the values that were granted by a decree of any head of state. Those are the values that are attached to being human. I was nurtured by those values. The first one, the respect for the other, for what he is, even if different. We should not go against the other, against his will. Think about why today I will never go to France – or anywhere else – if I do not have a visa, in the same way that someone can say now that you cannot

come to my home. That negation of the other is the very same logic that controls the protection of the constitution in Cameroon and its laws, and our Penal Code.

There is a crime that we call 'violations of the home'; the Constitution prescribes that home is inviolable. So when the Constitution of Cameroon guards the inviolability of the home what it guards is what happens inside a home. What happens inside a home is sexuality, or that which allows you to express feelings as noble as love. It is in sexuality where one says 'I love you' to someone else, where we give and we show to our partner we love them. We become one with one another, it is how we reproduce, it is how we thrive and flourish. We express the noblest feelings. That's why privacy is sacred and that's why we reserve it, like we reserve a football stadium for football, we reserve sexuality for the home. And what does that do? The state has pledged never to violate the home but to protect it: there are commitments for protection, but often regimes transform them into systems of repression. This renders ineffective the commitment that our heads of state take on to ensure the basis of equal rights, and the protection of human rights (including the right to privacy), the right to enjoy all human rights that everyone else has.

In 2003, I had a visit from a group of young people. There were in the group some French and some Cameroonians who came to tell me that they were on vacation with their friends, and they seemed very happy, very happy! Only through small gestures I realised that they were more than friends. From that moment on I wanted... I understood very well how it is when one lives his sexuality in complete freedom at home, in France. When you are there you cannot imagine how one can find himself in a land filled with the repression of certain freedoms, those that you easily have at home in France where you live. And so I decided to give them some 'warning', in case other people realised like myself that they were more than friends, including homophobic people, even maybe police officers, who could ruin their vacation. So I

“It is in sexuality where one says 'I love you' to someone else, where we give and we show to our partner we love them. We become one with one another, it is how we reproduce, it is how we thrive and flourish. We express the noblest feelings.”



◀ Alice N'Kom in her office in Douala, Cameroon. A lawyer, who for ten years has been dedicated exclusively to the defence of homosexuals.

started a conversation by saying 'Oh, a number of countries in Africa penalise homosexuality. Do you know that Cameroon is among them...' and I watched their reactions. They became aware of the situation, a situation they had not thought of.

**GTK:** You were not shocked?

**ANK:** Not at all.

**GTK:** You said that you are an African grandmother, who has lived through two generations. So then I want to go back to something. It is said that homosexuality is a recent phenomenon in Africa, that homosexuality did not exist in Africa before. Being an African

grandmother of 70 years of age, can you attest to this? What can we say about this, of the people who say this?

**ANK:** People who say that is not right at all, not at all... not at all. I want to give you examples that you can use to demonstrate that the criminalisation is making this assertion with no basis whatsoever. Cameroon is a country that has been independent since 1960. In 1965 we had our first and young Cameroonian parliament, housing among its members representatives from all parts of Cameroon, including the most remote. In 1965, Cameroon had no television, Cameroon had no

radio; we had no social media, communication was difficult, we had only the telephone and we still had to go to the post office to ask for things we now know because of technology.

**GTK:** But we can still stay we are in the 'morning' of technological development...

**ANK:** Yes, yes we need to wait. Now everyone has a cell phone, that's recent. But because we are in 'the morning' we are closer to earth than the modernity of France is, or the modernity that is happening in America. As it is today, any member of parliament is in real time interacting in his Twitter and his Facebook; he knows everything that is going on at the same time that American morning or Egyptian or Tunisian, or Tokyo mornings. Well that was not the case back then, so we had people there defending the true African values. They were not in contact with other values, although those are not different anyway: human values are the same values for all, no matter how strange is the place where you find yourself! Then, the Penal Code was there to punish a set of behaviours that were likely to pose prejudice to a person and/or property, established according to their understandings of that general criteria: there was, for example, bigamy recognised since the beginning in the Cameroonian code, but never homosexuality.

**GTK:** Homosexuality was never criminalised?

**ANK:** Not at that time. There was a second law in 1967 that amended the Penal Code, which had never been changed before that. But it was not until 28 September 1972 that the President of the Republic, Mr Ahmadou Ahidjo, signed a bill alone in his office. As chief executive, he imposed his authority over the parliamentarians almost like saying: 'Hey, I'm going to do it because I'm the President of the Republic'. That bill was then rendered into the Cameroonian Penal Code through tampering, because he broke the seal that separated the powers that grants only to the National Assembly the power to determine the crimes and offences in Cameroon, without exception.

**GTK:** ... normally the chief executive has the right to propose, but not to establish bills outright.

**ANK:** But for us it is often the chief executive alone who proposes bills, otherwise they do not become laws. The Assembly takes over when he does not present bills, but whenever it is his then it would have gone through for sure... This shows that in Cameroon at that time there was no separation of powers other than on paper, he was the only leader after God, so he signed the order and introduced it into the Penal Code. He shoved aside what the MPs had done since 1965, and seven years later he introduced homosexuality in the Cameroonian Penal Code.

**GTK:** But how do we understand the Penal Code against the social reality and the traditional everyday life of Cameroon? And I will go back and ask you from your position as someone...

**ANK:** ... who is 70 years old...

**GTK:** In Africa we say that so many people die young, so actually I have the opportunity to be sitting with someone who has seen the African history before and after Independence.

**ANK:** Yes.

**GTK:** Was this the phenomenon that existed?

**ANK:** Of course! Listen, we were taught that the oldest person discovered in today's world was African. So no one could have brought homosexuality other than an African, he was the oldest dweller. So homosexuality exists since men exist. Today we think that even in the Bible, the relationship between David and Jonathan was a relationship that was similar to a homosexual relationship. Well, since creation is so diverse, divine creation is essentially diverse. We cannot imagine a god lacking imagination in creation, a god creating only one type of sexuality. Because today we can confirm that there is a homosexuality, heterosexuality, transexuality, bisexuality, and so on, through science, through evolution.

**GTK:** When did you realise that homosexuality existed?

**ANK:** I have realised it when I began to plead and I saw it in the Penal Code. But otherwise I'm sure I was in classes with homosexual classmates. It was never a problem for me. I remember very well in my neighbourhood there was a transsexual called Amina, she wore dresses and everyone knew she was a boy. And no one ever did her harm, we never laughed, and everyone went on their way. We could have never imagined that someone could come and arrest Amina because ...

**GTK:** ... because she was a homosexual man, (as understood in the code).

**ANK:** There you go, we knew she was a boy and that he had girl mannerisms. And at that time someone should have told us he was gay, but no one spoke about it.

**GTK:** Perhaps no one felt that an explanation was needed.

**ANK:** And we have families too. Within a family there are young boys who like to stay with their mothers to help them cook and so on. We found that... well, mothers thought it was great. This child was always with her, and gave a hand with the chores. And that was it.

**GTK:** I would like to go back to your Association for the Defense of Homosexuality. I find it rather daring to name an organisation like that with the current background you have in Cameroon. With a president who has passed his own law in a currently homophobic context, how were you able to start the association? What happened? What is the experience?

**ANK:** In fact, when I met these young people, the ones who visited me, I felt sad. That is when I felt compelled to do this; I realised that we need to try and further examine this problem, and to stop abusing people for being who they are. We send our youth, often very young, to study here [in Europe], in countries where they do not penalise sexuality. If the young person discovers their sexuality over here and has had a great education – like engineering or medical school and so on – and if he wants to come home and contribute to the development of his country, what do we tell him? Don't come back because we have reserved you a spot in jail! I must say that is the state we currently are in. So that is why I set up my association and I wanted to bring up the debate openly without any hypocrisy, without sneaking around. I wanted to start that openness with myself, and not hide my intentions.

That is why I called my association the Association for the Defense of Homosexuality. I knew this would get the attention of the prefect and that he would quickly say: 'No, we cannot legalise an association whose purpose is illegal or unlawful', and that is exactly what happened. The prefect then asked to meet me, because this was provocation for him. So I went to my appointment carrying the Penal Code, as well as the Constitution and a number of treaties that had been already ratified. I put them right under his nose and he realised that I had the law of the Republic on my side, supporting my claim, proving that this article of the Penal Code is illegal. Why? Because in the Cameroonian Constitution, in Article 45, the hierarchy of norms is clearly established, determining that the hierarchically superior law in Cameroon comes from international treaties and conventions, and from the protocols we signed and ratified, all those become the number one law in Cameroon.

**GTK:** Is the second one the Constitution in that order?

**ANK:** Yes, the second law is the Constitution; the third law is the law of the Parliament. So I showed him that the President of the Republic is the guarantor of the Constitution, and that is stated in the Constitution itself. The President of the Republic has been elected to be the representative of the nation in the eyes of the international community, so he should behave accordingly and cannot put himself in a position where he would be violating his own mandate.

**GTK:** Internationally?

**ANK:** Exactly. Besides, I didn't want to put the prefect on the spotlight, so I explained him that I was working more than he was for our president. But I was not elected, and in reality if he didn't legalise my association he would be failing our president, and I'd let him know. So the prefect said 'Ah, from that perspective, okay' because the refusal from the prefect, and his arguments, should be written. Therefore, he understood my position regarding homosexuality and the Penal Code, so he could no longer write a refusal and contradict the arguments that I presented to him.

**GTK:** He had no legal arguments to reject your association then.

**ANK:** Absolutely. Then there was no justification to reject my request, because I could then refute his rejection.

**GTK:** He was not going to give you an authorisation at first then?

**ANK:** No, he was not going to give me one, and that is an issue I wish I could bring to the forefront. Because I can confront the administration, as it has to respect the law on freedom of association, we could oblige him if he had said no. This is a simple administrative formality: he cannot refuse a service that is part of his mandate. That is also recognised as an offence in the Penal Code. But I could not have dealt with that; I cannot be in all battles at the same time; this one came to me.

**GTK:** Does it prevent you from working?

**ANK:** That doesn't stop me from working since the law provides that after two months, if it is not opposed...

**GTK:** ... or if he has not given you an authorisation you are considered...

**ANK:** It is considered I am a defective juridical and legal personality, and so I work. And as I have other much more important challenges on my path I have chosen the path towards decriminalisation, that other one is secondary. I could face it, but only if I had to.

**GTK:** The challenges, let's talk about that.

**ANK:** So, once I won that first administrative battle, which gave me legal existence, I had to give this association a life. I gave it a mind so that it could think how to achieve its objective, and hands to perform its actions. A head, the eyes, speech to express itself. That's what I did. I knew very well that I wouldn't have any members, any staff, no one who would agree to do this.

**GTK:** Partners?

**ANK:** Partners. So I put myself at the service of this cause. And then I started to watch out in the newspapers, looking for stories in the news about



the arrests of homosexuals in this or that part of Cameroon. The lawyer would run over there to read through the case files.

**GTK:** We're talking about you, right?

**ANK:** Yes, with my personal means, that is how I started to accompany people who were in trouble, arrested, and called upon to be judged for homosexuality, and to accompany them to prison. I started to become their family and their mother, because when they are in this situation often everyone leaves them, including their mothers, which is very painful for them. So I accompany them to plead, to defend and support them, precisely by making myself known and at the same time communicating on the issue. Communicating about it because I always knew that silence was also a crime against homosexuals, against the cause.

So I started to communicate, to make others aware that people were being arrested: this is what was stated in these case files, that's how they were conducted, these are the arguments, these are the challenges I face. And the international community began to learn that there was a problem with sexual minority rights in Cameroon. The state could not stand this because they preferred silence; they didn't like that these sorts of things were being reported. I started to inform the international community, human rights organisations and to have a voice, provide a voice for the homosexuals. And I told myself: I need to reach the Supreme Court, because then I know I would get the chance, since these are violations of fundamental rights that are protected within our general principles or within a treaty that has been signed and ratified. And I would have this opportunity if the Supreme Court ever expresses a decision on the position of Cameroon on the issue, and if it does not favour me when I had been given the chance, then I can bring this to the regional or international jurisdictions. Then it can be issued that Cameroon has violated its commitments by internal procedures, even against some of its Cameroonian community who suffer a real apartheid. Because when institutions are responsible for protecting you it is their mandate – that is how it was decided – and the commitment to do this when it is turned against you, that is apartheid. In that moment we all need to come together and try to do like we did with the apartheid against skin colour in South Africa: we need to do the same thing for the homosexuals and make the African leaders understand that while they are doing things in the name of a tradition – which we don't know the content of – part of the population that they have committed to protect is getting killed.

**GTK:** Have you made many friends on this battle?

**ANK:** Oh my! I knew very well that I wouldn't have any friends once I took on this battle. I also knew that

I would be alone, that I wouldn't have any external help. But yet I am a lawyer who has always litigated on very complicated cases. I have litigated for bad guys, for people who killed, who caused harm to others, and I was never threatened. I litigated 22 political trials that touched very sensitive issues at that time and I was never threatened. And I could not have imagined the extent to which homophobia can arouse such violence and aggression. So I started to see doors closing on me one after the other, because of this battle. Then I was criticised by the Minister of Justice himself, for what I said in interviews on RFI,<sup>3</sup> where I expressed my point of view as the president of an association, so he asked the Bar Association to revoke my Bar. Because he claimed that a lawyer like myself, who 'publically defends crimes', is an offence to the Penal Code, and as a lawyer I am violating the honour and dignity of the profession. So my second battle was to fight for my profession and remain as a lawyer to win on this front. All this was done because I responded to the complaints made by the minister, by the judges who supported him (the union of judges from Cameroon who signed the complaint), and also by the President of the Republic.

**GTK:** Excuse me, the Association of Judges of Cameroon is different from the Bar Association?

**ANK:** Oh yes, these are two different entities, and the Minister of Justice has leaned on the Cameroon Bar Association, and it was the magistrate and director of the Human Rights Commission who signed the complaint. Clearly I had to defend myself. I told them that when I was talking about homosexuals I was doing it as the president of the organisation, and not as a magistrate. Consequently, nobody could bring me to justice for that or in front of the order of the Magistrates, since the president of an organisation can speak as any stakeholder of the civil society. This has embarrassed the judicial council greatly. I told them that they were incompetent to judge me and that the complaint was unfairly signed by the president of an organisation, the Cameroon Bar Association. Consequently, this had nothing to do with the judicial council.

**GTK:** What happened with the case then?

**ANK:** This was reported to the Minister of Justice, asking for his instructions; the arguments were presented, and he declared that he intended to get advice from his collaborators on the case. No answer ever came. The file is still pending in the court of appeal and the judicial council. I have not got any information on this yet. I think they feel compromised by my argument. Therefore the case is still 'there in the air'.

**GTK:** ... but in the meantime in terms of work, how did the organisation...

**ANK:** I work very hard, but like a business without any

“By the time when I might be able to win ... I would like other people to be prepared to fight for this, and get a sense of ownership of this.”

staff, I have nobody helping with the communication, with financial matters or judicial matters. I need to supervise everything myself. In the end, I take care of marketing, the 'product' and everything else on my own. I understand that it is a multidimensional battle, and that I need to lead it all at once. I do not want that, if tomorrow I win the case at the Supreme Court against the article 347 bis – because that is what this is all about – (not on homosexuality but against the Supreme Court taking a position about the enforcement of an article), I would not like to go back home and find out that one of my 'sons', as I call them, my 'gay sons' has been thrown out of his family home by his mother because she found out that he was homosexual. By the time when I might be able to win (because I think we can win!) I would like other people to be prepared to fight for this, and get a sense of ownership of this, because it is their battle.

People used to say at the beginning that I could not defend homosexuals because I was not a homosexual, and I always answered to them, on TV, that I would have liked to be one, just to say 'yes I am homosexual'. Since I know that the judge would never put me in prison as he is doing with young adults from the neighbourhoods. No, I'd say 'you cannot, Mister Judge'. I'd say 'I am homosexual and hence you know fairly well that you cannot arrest me because of that, and I hope that you could stop doing it to others'. Now I do not want as I am heterosexual, to have to say 'yes, I am heterosexual' because I do not want people to think that if I was not heterosexual...

**GTK:** ... playing their game...

**ANK:** Indeed... or that I could let down people that believe in me. No, I do not answer this question because this is not a question that one has the right to ask anybody. The journalists have to go back to the article 304 of the Penal Code that punishes the offences in the press: press offences are punished when they infringe on the private life. If you claim that I am stealing, the judge can condemn you for having written in your journal that I was stealing. If you have the proof that I was stealing, the judge will listen to you and will give you credit for that. But if I accuse you of writing that I was a homosexual, knowing that I could be imprisoned for this, and if I bring you to the judge for that, you do not have the right to prove that it is true. This is because you are violating a 'domain' that is sacred and protected by

the constitution. Do you understand me? This is one's private life; no judge has the right to authorise anyone to investigate another one's private life, because the judges are there to protect it as a right, and this one as a priority. Therefore, you the journalists cannot think that you can come one morning and ask 'Madam, I am homosexual and what about you?' No, this is strictly in the private domain and this has to be for homosexuals. Nobody is asking heterosexuals if they are heterosexuals and hence no one should ask a homosexual if he is. Therefore, that it is the reason why I do not answer to this type of question, because it is none of your business, it is about my freedom, and I keep it fiercely for myself.

**GTK:** But you said that the judge could not put you in prison, even though he is putting others in prison. This raises an important question regarding the social status of people that just like you, know and are able to defend themselves, and consequently are able to live their lives the way they want without 'pressure', and that is not the case of many others that are vulnerable and hence subject to illegal and unjust measures. Is this also happening in Cameroon? This question of people and the way their social status is affecting their life?

**ANK:** Listen, in 2006, or late 2005, the Catholic Church and the archbishop entered in a crusade against homosexuals portraying them as the 'devils' responsible for unemployment in Cameroon. The accusation was that the men in high administrative circles were forcing young adults looking for jobs to have sex with them; this was relayed by the media to the point that lists of presumably homosexuals were published in the press every day. This was known as 'the scandal of the Top 50'. These newspapers were being sold at a high price, higher than the magazine *Jeune Afrique*. This has led to an uproar. Kids did not dare to go to school if the name of their father appeared on the list. At the time a kid stabbed another kid with a knife at the American School, the police suggested to the kid that he should defend himself saying that he had killed the other kid because he had made homosexual advances towards him. Clearly, everybody thought that the kid defended himself very well. Can you believe that? At the end it appeared that the kid who stabbed the other one was schizophrenic, but the main problem was that it was the police that advised the boy to use that argument for his defence.

But when the newspapers started to publish names of presumably homosexuals of high rank in the public administration, ministers for example, the President of the Republic got involved through a speech on 10 February 2006 as the guarantor of freedom for every individual, targeting particularly youngsters in order to emphasise that this was a private matter, and hence sacred. Everybody knows this speech... and it stopped what was going on. Therefore you can see that when ministers got involved, the president did defend the social status and right to private life... But when it is about young men, they can get arrested for writing text messages saying that they love someone. The president said at the Élysée Palace [during a state visit in France] that 'we should wait for public opinion to evolve'. This brings responsibility to the president for this unjust situation of 'two systems'. Homosexuality in high circles is a private matter and sacred, whereas homosexuality for common people is not, or it won't be until the public opinion changes... These two systems do not give people the willingness to fight for a cause, and they will keep discouraging them as long as it continues to spread negative messages in society.

**GTK:** In Cameroon, are the mindsets evolving? Is it changing rapidly? Are people tolerating or not tolerating these changes?

**ANK:** Mindsets in Cameroon (and I am happy for this) are changing because I have tried and succeeded in 'breaking the wall of ignorance'. I remember once as I was coming back from Geneva after a meeting led by Madame Navi Pillay from where I brought back documents on the rights of minorities. I wanted to share those documents with the magistrates in high circles, the ones that are in charge of the legislation that guides judicial rulings. Hence, I went to see one of these 'high' magistrates and told him that I was coming back from Geneva, and that I was bringing documents of interest that I wanted to share with him. After consulting them, he told me: 'I have to confess to you that I was homophobic by nature because I was raised in a social environment where I was told that was not good. I was going to church and the priest used to tell us that this was not good. Now that I have listened to your speech on TV... '.

**GTK:** You have been invited to talk on TV?

**ANK:** Yes, I have been on TV in Cameroon. Sometimes, it was to be yelled at, but I would not miss an opportunity. So, the 'high' magistrate told me, 'since I listened to you, you have woken me up as a magistrate as the judge that I am, and I recognise that I have changed my mind and that what you said makes sense'. And he added, 'are you aware that the Ministry of Justice is in the process of drafting a new law to take into account your arguments regarding the text that is not a law and should be one. Now, they want to propose a law that will criminalise homosexuality...' and I said 'NO!!'

**GTK:** Criminalise or de-criminalise?

**ANK:** No, criminalise, to reinforce the criminal rules.

**GTK:** ... to invalidate your arguments.

**ANK:** Exactly! If this law is brought to the Legislative Assembly, it will be voted and approved, even if any law passed by this assembly against homosexuality cannot be legal. This law will follow the same path as the presidential ordinance as it violates the constitution and hierarchical order of international law.

The issue today is to make people understand this... This meeting with the 'high' magistrate has allowed me to gain key information and I have been able to start lobbying work that stopped the bill in the Legislative Assembly; the bill then is still 'wandering' in the corridors. This has allowed us to warn deputies and to inform them that if they were to approve this law it would be illegal. I would say to them: 'refer to the law in article 45 of the International Protocol of Maputo and all the other international treaties that would not allow today Cameroon to penalise sexual behaviour among adults because it is a fundamental right'. On top of this, you are aware of the position of the President of the Republic who has said that it is sacred, in a public speech that everybody can refer to, hence you cannot accuse him of being a liar or someone that does not respect the word of Cameroon. Because there can be consequences and you will pay for them. Their own trust is at stake if they clearly do not respect their mandate.

“Homosexuality in high circles is a private matter and sacred, whereas homosexuality for common people is not, or it won't be until the public opinion changes...”

**GTK:** For homosexuals in Cameroon of lower social status, how are they doing?

**ANK:** Nowadays, young people in Cameroon are having a hard time. We are living in a country where the president, elected under the rule of 'one ruling party' is 'worn out' after 30 years of power. Nothing is changing and he has not shed his skin, and he is 82 years old. Hence, there are a lot of complaints, many of those about abuses to the rights of young people, rights of the diseased ones, rights of women. Well, it is not particularly towards X or Y, it is a general feeling where everybody is unsatisfied. Therefore, a young homosexual living in poverty and without rights has one great opportunity; that is to join our organisation. Because there he can learn his rights and how to defend himself from many infractions against the Penal Code: before being judged guilty, there is a code of procedures that needs to be respected, the code developed only in 2007, recently.

**GTK:** It is recent!

**ANK:** It has been developed with technical help from Canada, a champion when it comes to human rights. This Penal Code of Procedures is very human rights oriented. Very human rights oriented! Therefore, a homosexual today that knows that whatever the place he got arrested, he has the right to remain silent in the police headquarters, and he has the right to say that he will not speak without the presence of his lawyer. And hence no policeman can send his file to court. This is written in the Code of Procedures and everybody has to respect it. If someone is aware of this the police will back off, because they will realise that they are dealing with someone who is able to defend himself. In this code, there are procedures and penalties addressing policemen and magistrates violating human rights... but people are not aware of all this... Legally today, nobody can be brought to justice this way if that person knows his rights. Therefore, homosexuals need to learn about all this by joining organisations like ours, as they will become 'new men' who have rights and know that they are protected by the laws in Cameroon. Even if the Code of Procedures is fairly recent, it has been elaborated and promulgated by the Ministry of Justice, the same who wanted to put me in prison and take away my lawyer licence.

**GTK:** There is a strong contradiction here!

**ANK:** Yes, the Code is very human rights oriented: nobody has the right to arrest you if it is not in *in flagrante delicto*, otherwise you cannot be asked to come to the police headquarters, and if you have to go you can keep silent and nothing will be happening to you. If you are not aware of this and you start talking because you get intimidated then you lose this benefit. And what can happen then? The police bring you into the examination room and proceed to have

an anal exam carried out on you by an army doctor who is going to violate your intimacy by putting his fingers into your rectum in order to establish if it is sufficiently firm or not, to determine whether or not you are a homosexual. All of this is forbidden by the Code of Procedures! These are human behaviours that are degrading and humiliating. These acts of the police and the doctor are illegal and you can sue them. As you can see, the first obstacle for an 'ordinary homosexual' is to ignore his rights. It is against the ignorance that organisations are working, making sure his rights are respected, at the expense of many risks for us... I have very often received death threats, can you believe this?

**GTK:** But you are winning on that front...

**ANK:** I haven't won yet, and I have a lot of enemies. But also I have the support of the international community that defends human rights. They (my enemies) also know that I have a lot of powerful friends ready to help, and more friends that are ready to contact the President of the Republic to remind him of his role as guarantor of freedom for everybody. And that can make him understand that I am not his enemy and that I am a person that can help him to translate into actions the words pronounced in his speeches.

**GTK:** You have many friends protecting you.

**ANK:** Yes, perhaps. I think that you are fortunate when people want to protect you. I have always said to people that they should save the bullet for somebody else, as I am old and it is not worth killing me at the risk of having serious problems for not much. You are certainly younger than me and have a life to live, and I wish you to live up to your seventies as I do. And I tell them, listen I have kids, I did not choose the sex of my kids, nor their skin colour, neither their eye colour and nor their hair colour, nothing. I cannot imagine that my son or my daughter picked their sexual orientation. Since I was unable to choose and if I were to choose it certainly would not be homosexuality because I wouldn't want to expose them or solve a problem that shouldn't exist in the first place, to risk their lives and dignity – if I were to choose. I am certain that a child born to this world, if he had to choose for himself would say the same thing. But I do not understand how a mother can be manipulated by the church and reject her son because he is gay. I am not certain that we were better mothers or happier mothers than that Yves St-Laurent's, since everyone knew he was gay and he didn't hide it. Everyone wanted a child like Yves St-Laurent and his name became more famous than the one of a child who will die tomorrow. You know we are not better mothers for giving birth to a heterosexual child and we are not lesser mothers for giving birth to a homosexual child. The homosexuals



that you know of, that you adore and profit from their art and masterpieces, there are many of them. And as long as you do not know they are gay, they don't have to tell you, you adore them because you admire them. So why do you want to find out if one of your children is gay, why not others? You must respect the privacy of each of your children alike. While sometimes I'm asked on TV, what if I walked into my son's room. I answer that first I'll start by apologising; I should not enter into my child's room without asking.

**GTK:** Is this how you have educated your kids?

**ANK:** These are my sets of values. Indeed.

**GTK:** Then to conclude, what is it that you want to achieve now? What are the big battles that you want to fight for? What is going to be the major fight of your organisation in the next two to three years?

**ANK:** As a magistrate and as president of an organisation... we have been working through a long administrative and judicial process that is now in the Supreme Court. We have two pending cases: this one regarding the young man that has been imprisoned because of his text message and went through the Court of Appeal.

**GTK:** He was condemned for... ?

**ANK:** Homosexuality, they have condemned him for his homosexuality. And what has the Penal Code to say about homosexuality? It says that you will be judged guilty if you perform a sexual act with someone of the same sex. And at the time when the President of the Republic created in 1972 this one, his own 'piece of law', there was no cell phone, and no text messages. The legislation could not have predicted that young men could be put to prison years later because they wrote text messages. Never could we imagine that a judge in the Court of Appeal (in fact three judges) will say that this text message is a homosexual act, a sexual homosexual act.

**GTK:** Was there any picture in the text message?

**ANK:** No.

**GTK:** So, someone sends a text message to another man saying 'I love you'?

**ANK:** Yes, and he was arrested and brought to prison. He underwent an anal examination because there was no obvious offence. The prosecutor had no right to give a detention order because he can only issue a provisional detention order if he has committed an obvious offence. He was condemned to 36 months in prison; this was later confirmed in the Court of Appeal by three judges. This means that justice in Cameroon has a serious problem and it needs to be addressed, we need to 'recycle' the judges towards 'the new rights'. Quite frankly, this is even more serious; our judicial system is ill. This man was condemned for

36 months. We tried the Court of Appeal, and are now going to the Supreme Court.

We are now wondering when the Supreme Court is going to give a verdict. By then he will have already served his sentence anyway, he will no longer be in jail, but the question that is to be determined is whether they had the right to prosecute this person on the basis of Article 347-bis. Does Article 347-bis still have a place in our Cameroonian legislative arsenal? Is the president not an obstacle to the compliance of Cameroon with its international commitments? These are the questions we need to pose to the Supreme Court, asking it to declare the inapplicability of this article, because it has no place in our judicial system! It does not protect anybody, it does not allow the judge and the legal protector of individual freedoms to protect anybody, but it forces them to oppress people. That is quite the contrary to the judge's original mandate.

That's the stage where the case is. And that is why I am happy to have come here, because I want you to be by my side at the time that I plead this case. I would like the Supreme Court of Cameroon that day to become the Supreme Court of the world. The Supreme Court of human rights: where human rights are going to be taken into account, including gay rights. But before, I wanted to take this opportunity to ask you to help me prepare for the next phase based on what I know about the way the Supreme Court operates.

There are a number of things to do. And what I would like to make sure of today is that with the members of the Supreme Court who will go through the case file, we will all have the same text in mind. That the judges, who are also members of the Pentecostal churches, fundamentalist churches, on this day they will not have religion on their minds but the legal texts that are common to all of us. I would like to make sure that on this day we all speak the same language, we have the same point of reference, and that everyone puts aside their religious beliefs to give place to state law.

**GTK:** Madame Alice, Thank you very much...

## Endnotes

<sup>1</sup> Ed. note: Barak Obama visited Senegal in June 2015. See Adam Nossiter, 'Senegal Cheers Its President for Standing Up to Obama on Same-Sex Marriage', *New York Times*, 28 June 2013, [www.nytimes.com/2013/06/29/world/africa/senegal-cheers-its-president-for-standing-up-to-obama-on-same-sex-marriage.html?\\_r=0](http://www.nytimes.com/2013/06/29/world/africa/senegal-cheers-its-president-for-standing-up-to-obama-on-same-sex-marriage.html?_r=0) (accessed 12 October 2015).

<sup>2</sup> Ed. note: Gorée is a small island in Dakar, Senegal; it hosts the House of Slaves, now a museum and memorial dedicated to the Atlantic slave trade.

<sup>3</sup> Alice N'Kom has featured on *Radio France Internationale*, one of the prominent international media in Cameroon.



## Q&A **Iñaki Regueiro De Giacomi** *in Conversation with* **Arturo Sánchez García**

▲ 'Gender Identity Law NOW'. Patchwork of banners and flags from different organisations, including the National Front for the Gender Identity Law.

**Arturo Sánchez García:** Thank you very much for participating in this conversation with us. I would like to start with the great topic that we have been discussing throughout the symposium: sexuality and social justice, and what law has to do with all this?

**Iñaki Regueiro De Giacomi:** What law has to do with it? I think law gives us resources to translate social claims into structures, into an order that has already a defined structure. Law functions at the same time as a tool to maintain the status quo of a community – which is what it is often used for – but there are also some exceptional and wonderful cases where law proves to be the opposite, a tool for social change. That is the law that I am interested in.

**ASG:** In those exceptions, the law becoming a tool for social change, what does the law mean in the day to day, in people's lives?

**IRG:** I think that law as a field or a profession is idealised; it is thought to be a world apart, all technique, aseptc, but at the same time needed in order to intervene in other worlds. But most of those perceptions are only myths; law is only a chance, a tool. What we should be looking at are the political principles that are behind

each action that is imposed by law (or through law) and the directions in which the law is taken, but always as a tool. For plenty of people the law is in fact a place to go to challenge injustices, and there it becomes fundamental to find allies who know the field, legal experts. But law is nothing more than that, a single part of a sophisticated social context of wider social relations; it is only one component of a larger structure.

**ASG:** What is this component made of? Are you suggesting that if law can help us to defeat injustices, as a community, as civil society, can we actually define together – or agree – on a shared understanding of justice? What does justice mean?

**IRG:** (laughs) That is a good question. I believe that each person can have a different understanding of justice according to their own self, according to their needs, problems and dramas. Justice is that one step forward, the

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situation or place of arrival that we all yearn for. Occasionally, juridical operators do not coincide with those understandings of justice and become instead agents of restitution; they maintain the status quo of a political community. It is crucial, therefore, that members of disenfranchised communities and groups can acquire juridical tools and themselves become juridical operators and translate first hand their concept of justice into law, because they know what injustice is, they live it, suffer it and are affected by it. Those who know what the claims are about can project the solution for them.

**ASG:** What does it mean to be a juridical operator?

**IRG:** A juridical operator is any individual with a determined role at any level of the juridical system, including all judicial employees and judges. As lawyers we are juridical operators, those of us who use the law and the system searching for justice in our day to day. Being a juridical operator implies many different things, responsibilities and privileges equally. Juridical operators occupy the space – the forum of the right to justice – where social claims are translated, the space that accommodates (or not) those claims according to different contexts.

**ASG:** The Argentinian context, at least in the last decade, has positioned the country as the regional leader of the development of sexual rights as human rights. What does that mean to you?

**IRG:** Before addressing the question I would like to emphasise the difference between LGBTI [lesbian, gay,

bisexual, transgender and intersex] politics and a wider context of sexual rights: one of the pending agendas of our young democracy is the access to abortion. That is, today, one of the most costly questions for justice.

**ASG:** What does it mean to be the leader then? I would assume that this dilemma produces new ways to understand the responsibility of the juridical operator.

**IRG:** To be the leader is a subjective perception. It is true that Argentina is recognised by international juridical operators and that when it comes to LGBTI rights the legal situation is more advanced than in other countries. This is for two different reasons (funnily enough, neither of the two is directly dependent on juridical operators): one is the political particularities of the historical momentum we are going through; the other one is the struggle of the organisations of sexual diversity, including lesbians, gays, and trans. There is a long path that started before the recuperation of democracy, from the times of the dictatorship, that has passed through different historical priorities. Right now we have these struggles, but at a different moment it was the decriminalisation, the struggle against dictatorship. There is plenty to track back in history in order to understand the current situation.

The juridical operators are only in rare cases part of those struggles and trajectories. It is important, therefore, to understand how they interact with organisations, with the movement. For example, if we want to understand the issues of trans people we need to understand how juridical operators allied with LGB issues and under whose terms. That might be the distinctive element of the Argentinian case. We are as juridical operators lawyers; we belong to certain structures that allow us – and enable us – to help, but only from a very narrow departing point. In the same way we are doing our job from this trench, we need someone working in the media and communications, we need leaders capable of mobilising people in the streets and who have the craftiness or the certainty to determine where to take the political movements to, and what is the right way to generate noise, to lead all actions in the same direction.

**ASG:** We are talking about the way the LGBTI agenda became a priority in Argentina, and the sociohistorical circumstances that brought it there. Can you tell us in more detail what makes the LGBTI agenda a priority now in the country?

**IRG:** I can only share my own reading of that question. In Argentina we have a strong human rights movement; the language of human rights has been elaborated across regrettable historical events: dictatorships, especially the last one that coincided with a genocide where thousands of people were disappeared. The struggle of the organisations of their

► Outside the building of the Federal Congress in Buenos Aires, Argentina. Hours before the Gender Identity Law was approved, an anonymous artist posted handmade drawings of gender non-conforming people in bus stops.





“Trans issues have been subordinated for a long time by other agendas... **There is always going to be in legal reforms some form of subordination, hidden voices behind the agendas.**”

relatives brought the topic to the regional agenda through the Inter-American System, an agenda reinforced by other massacres in different places on the continent. There was a pattern that got repeated in different countries.

In Argentina, human rights language is grounded within the system, not in the same way as in other countries like the United States that have a peculiar relation with international law. In Argentina, the international regulation of human rights already has a designated role with widespread acceptance. It is interesting the way the LGBTI movement started to channel their claims through human rights mottos. There were already doors open to a narrative, a discourse, language or field, so the new mottos got annexed into the larger human rights culture.

A good example of how this works is what happened with the Yogyakarta Principles.<sup>1</sup> When they were drafted in 2006, they were not aimed to create new human rights but to read the existent international human rights system and apply it to a specific collective through the principle of non-discrimination. I believe that what happened in Argentina was greatly because of that – historical claims that started to be heard when there was already a good reception on that perspective, new claims that started to be applied on an old perspective.

**ASG:** Can you tell us more about the legal reform that you were involved in?

**IRG:** I am part of Lawyers for Sexual Rights, ABOSEX, which was part of the Frente Nacional por la Identidad de Género (National Front for Gender Identity). The Front was a collective where many organisations came together; as its name indicated, its main objective was the enforcement of the law on gender identity. It was not the only coalition of organisations; there was also another group that produced a different bill also on gender identity. There were actually four different projects in the Congress, which build together the suitable momentum to open the debate. In that context a remarkable feature of the process was that the different organisations managed to generate consensus, despite their original differences. It was interesting to see how the diversity within

the different movements was put aside in order to create a block powerful enough to face the state. That speaks of a level of maturity of the movement. The diversity within the movements made the campaign even stronger and we managed to avoid having other instances profiting from those differences to fragment the campaign.

Our intervention more specifically was as mentors for the specific questions that we were asked to intervene in, only because of our specific technical expertise. That is, at the end of the day, what law does, it doesn't work on its own as a science. That does not undermine, however, our position as LGB allies in the political debate. We take part in those political dialogues. I would never see the intervention of lawyers on this context as a neutral intervention. We were doing activism too.

**ASG:** But you did not define the agenda.

**IRG:** We did not define the agenda. We are an LGB organisation, and this was a trans issue. Trans issues have been subordinated for a long time by other agendas. We have to recognise that Argentina had first the equal marriage law, and only after that the law on gender identity came forward. There is always going to be in legal reforms some form of subordination, hidden voices behind the agendas. The purpose of this process was to have the trans organisations drafting the bill themselves, and that is ultimately what determined the quality of the text of the bill, that it shows how something as static and conservative as a norm can become a political banner. It is amazing when political processes are enriched by this legitimacy, when that legitimacy is what ends up grounding the body of the text. This was an original process; no one copied or imitated from other contexts; it was a law that came together with the organisations in Argentina; we were lucky and honoured to be part of it.

**ASG:** What was that momentum? You are talking about a momentum, the specific context that enabled the legal reform, what do you mean?

**IRG:** I could not fully define it, but I can share that as a precedent equal marriage already represented a step ahead in 2010; our law came by only two



years later. Even before equal marriage, projects for gender identity bills had been circulating for a long time, but were never included in the agenda until then. I think it was a careful choice of the movement to arrange one issue after the other. Every year in Argentina since 1992 there is a massive pride parade, and each year it needs to choose a motto. Every year the organisation has to mediate the different organisations for a consensus in the motto; having achieved such great victory with equal marriage, gender identity emerged almost spontaneously as the great pending debt of the movement. It followed somehow the Spanish pattern that recognised first same-sex couples, and only later gender identity. The pattern is, of course, subject to many critiques.

**ASG:** Did you have any direct interaction with Spanish activists?

**IRG:** No, we didn't. Before I was in the Front with Emiliano Litardo, who is my militancy companion whom I carry out this work with. We were in CHA [Comunidad Homosexual Argentina (Argentinian Homosexual Community)], a historical organisation in the country. Our organisations did not interact with them, but they did have a strong presence in a different campaign, in equal marriage. They then worked together with Argentinian activists. In fact Pedro Zerolo came to Argentina;<sup>2</sup> there was direct contact. In gender identity not as much. The interesting feature of this law is that it is a depathologising law; it had no previous pattern to replicate. There are some precedents in the work in Yogyakarta, where Mauro Cabral collaborated as one of the Latin American experts, who also took part in the leading team in the Front.<sup>3</sup> The new pattern for this new law was nurtured by the Yogyakarta Principles, the discussions that were circulating around depathologising principles like the STP-2012 campaign,<sup>4</sup> and what trans activists themselves brought to the table.

**ASG:** As far as I know from the marriage example, the processes revealed an interesting understanding of the structure of the Argentinian state. That process was initiated in the judiciary and only after it passed to the legislative, an unusual path for civil law systems. We learn then about the way the authority

to legislate passed from one branch to the other in democratisation. Were there any comparisons in the gender identity law process?

**IRG:** Something similar happened in both cases, but not the one you mention. It was the lack of support within the judiciary for the path opened in Buenos Aires' jurisdiction. The coincidence was an important backlash for militancy. It was not only lack of support but also a militant opposition against the progress within the judiciary, a conscious decision of opposition, turning away from the more 'progressive' jurisdiction that the city of Buenos Aires already had [with equal marriage]. But the campaigns also coincided in having favourable results of course. The judicial channel was used in the strategy inasmuch as it helped our ultimate goal: a law enacted by the Congress with binding force in the whole country. It was like an 'operation bolt' where all the branches of the government were targeted: the executive was targeted through the National Institute Against Discrimination and the different allies we had there, the legislative because the battle was in the Congress of course, and in some places within the judiciary (not in the whole branch) we found support. The three branches were targeted, in addition to the media strategy, and a mobilising strategy in the streets. It was an all-encompassing campaign.

**ASG:** Was Argentina ready for this change, or was the reform a trigger for change.

**IRG:** Questions like that always circulate when a change like this one happens, both during the campaigns and in the discussions that precede them: is society ready for this? The problem with this question is that it actually enquires about the existence of *the other* in society, as if the question itself can reveal the capacity of entitlement for rights and existence of *the other*.

All the realities that are addressed by these laws precede the laws, by far; the main change they bring about is the removal of legal obstacles. The legal obstacles are what we get to recognise after extended work in legal aid – what is it that is been damaging and putting people's lives in risk? Legal reforms are aimed to eliminate state homophobia, and that's it.

“Legal reforms are aimed to eliminate state homophobia, and that's it. The social question, whether society is ready or not, is a question that we can spend plenty of time exploring... But I believe that **there are matters of human rights that do not require debates.**”

The social question, whether society is ready or not, is a question that we can spend plenty of time exploring: we can address it in sociology, statistics, polls, etc. But I believe that there are matters of human rights that do not require debates. The value of that debate might be interesting for the academic gaze or for planning in public policy, but human rights questions should not be subject to referendum. That was also a big debate in the campaign on whether a referendum was recommended. If people have individual rights guaranteed – the right to dignity, recognition – then if society is ready or not is an ancillary question, it is a question that needs to be progressively built.

I agree that legal reform helps to change society: it provokes a public debate and enforces the visibility of the people who belong to those collectives. In all our households the theme was there; it stopped being invisible, rare, sinful, criminal. Nevertheless, the state of affairs in Argentina dictates that two women getting married would not generate a big scandal nowadays, neither does a trans person with a television show in primetime; sexuality became already day-to-day affairs. Now, we cannot temper that change only with the law.

**ASG:** As has been discussed in the symposium, whenever we are trying to talk about social justice we end up restricting a conversation to only about human rights. You are suggesting here that there is certain independence between the human rights trajectories and the local imaginaries of social justice, at least societal perceptions of sexuality. The notion of social justice that we keep attached to in our sexual rights narratives, does it change with the institutional interventions (like legal reforms) that are transforming the trajectory of change and democratisation in Argentina?

**IRG:** The notion of social justice in Argentina has a very heavy weight because of its own historical and political circumstances. The path for social justice was initiated in our history in a way that is very difficult to stop now; it is now ingrained in the expectations that people have of the state.

All these debates that we are having here are not separated from that. For example, in the Gender Identity Law campaign one of the biggest struggles was to not separate the idea of gender identity from the right to health in our claims. Since they always work together human rights are indivisible; we cannot guarantee some without having others. That is a problem of social justice – how human rights target achievements; the same way the right to work (another one of our priorities at the moment) targets the economic and social welfare for every individual. It is wrong to consider those themes as freedoms, and not as issues that the state has to guarantee, and guarantee them with material resources. In that sense we recognise abortion as a pending debate



where a crucial question for social justice arises: why poor women are the ones that are dying because of clandestine abortions. We have always been well aware of those other perspectives in Argentina.

There is nevertheless a tension in the way those claims of justice are translated into human rights language, into rights that can be delivered to individuals while at the same time they embody great collective political struggles rooted in social justice claims, but always led by one protagonist group at a time. The tension is of course there, but for the social movements and their projects the two perspectives can only enrich them. Human rights language allows the movements to avoid those referendums, and enables access to international systems when necessary, or the courts at the national level. On the other side, the ideals of social justice bring richness into the movement so it can find its place in history, as part of a collective project. Both are available tools; they are not necessarily in contradiction.

**ASG:** If you were to share those tools with a new group, a similar group but in different parts of the world, what would you say were the greatest lessons you learnt in this process?

**IRG:** Every single context is different. We can never come up with models or patterns. Nevertheless, the first thing I would say is that the opportunity to generate the radical transformation that was unexpected years ago can now happen everywhere. We do not even need the UN, nor the Organization of American States, or the examples of the 'central countries'. The interesting and beautiful thing about the Argentinian process was that it produced a kind of sovereignty: the steps that everybody was waiting for but no one dare to take actually moved us forward in an unexpected context. It is interesting how we benefited from our capacity to look inwards, within our borders, and how we appraised action within our own circumstances.

▲ Marlene Ujayar speaking in a rally after the approval of the Gender Identity Law, surrounded by fellow activists and colourful flags outside the Federal Congress in Buenos Aires, Argentina.

I do not know if this can offer lessons for anybody else, but there is also something else to consider. The movement succeeded in making a detailed reading of the political context, and in building alliances within the state by showing them that these topics not only won't deprive them of votes but can make them win more. There was great merit in convincing people of that, as I mentioned; those were part of the movement learnings, reading the context and profiting from it. Unity and consensus within the diversity in the movement was key, and being able to diversify strategies, to not expect to move in one same path but to try all the possible ones.

It is important to acknowledge also that no structure is monolithic. The judiciary used to be perceived as very conservative and violent, and the movement managed to access it through the one small jurisdiction that was available. These themes were not a priority for the state, but there was only the one institution in the executive that was in charge of them, who ultimately became a great ally. That must be what all other organisations are doing everywhere already.

**ASG:** Besides the agenda of abortion, what were the other alliances that did not happen in the process, from the big agendas of human rights and social justice? You are talking about alliances within the LGBTI movement, but you mentioned that it was not possible to integrate the agenda of the right to have an abortion, and other agendas, other claims. You are also talking here about the evaluation of the political contexts, the capacity of the movement to read the context. Is there then another alliance that you would have liked to see in this process?

**IRG:** Well, the LGBTI movement works in a way that is more or less autonomous. I do not know if this is a good or a bad thing. This has provoked that in some rallies those against us were bigger in number than us. It is well demarcated what is comprised within the movement, and who are the other human rights groups that we are not in a dialogue with the way we could be. And we have in fact plenty of issues in common with other groups, for example the issue of disabilities: both groups suffer similar obstacles, and the learnings that emerge from that similarity are wasted.

In any case, when the debate set off and claimed political relevance there was more support, even though the support is still hard to negotiate to this date. The campaign for the right to abortion, for example, has the support of the LGBTI movement, and there is a dialogue that is pushing that campaign forward. But still there is a lot of independence in the movement, in both the good and bad sense. The support that has sometimes attracted leftist politics in grass-roots movements could have also supported

those other aspects. But this responds to the way Argentinian civil society is fragmented.

**ASG:** In this fragmented space, what does solidarity mean?

**IRG:** Precisely that; to push to the side one's little agendas ('the big little agendas') when those are only personal, individual, so we could be able to acknowledge that other struggle in which we can be involved tomorrow. It means to be able to see human rights as a whole, emancipation as one single phenomenon. If one group is being left behind or forgotten, if their rights are being violated, we cannot speak of a human rights celebration. What I mean is: today perhaps the LGBTI agenda has achieved greater benefits, but it is obvious that plenty of other agendas in Argentina still need support, even from the privileged ones. That is why solidarity is a key.

**ASG:** What is the future that you hope for sexual rights in Latin America?

**IRG:** A different one to start with (laughs). One that is a bit more auspicious, where the great majorities, women for example, will be recognised. That is the great paradox, at least in the Argentinian case, how is it that we have great achievements in thorny topics but we still cannot make the big steps in pending agendas. I think the region holds that complexity; we need a lot of work and a lot of creativity to overcome those huge obstacles. I wish that was not only isolated cases or a few exceptions, but stronger and more even steps regionally. This will be auspicious. Then it cannot be another destiny but progress in all these discussions; that is our pending homework.

**ASG:** Thank you Iñaki. It is a great pleasure to have you here with us.

**IRG:** Thanks to you.

## Endnotes

<sup>1</sup> *The Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity* were drafted by experts in the field to formulate specific states' responsibilities to extend human rights protection on the basis of sexual orientation and gender identity, according to the binding legal standards with which states must comply according to international regimes of rights. See [www.yogyakartaprinciples.org](http://www.yogyakartaprinciples.org) (accessed 17 October 2015).

<sup>2</sup> Pedro Zerolo was a Spanish activist and politician, militant in the Spanish socialist party PSOE. The success of the same sex marriage legislation in that country was in part attributed to his mediations.

<sup>3</sup> Mauro Cabral is an Argentinian intersex and trans activist, visibly active in the campaign for the Gender Identity Law.

<sup>4</sup> STP-2012, International campaign Stop Trans Pathologization (2010 [2009]) See <http://stp2012.info/old/en> (accessed 15 October 2015).



◀ A man holds a copy of the Qur'an.

# Faith in the Flesh

SHEREEN EL FEKI AND JAVAID REHMAN

## 1 Introduction

'Is Islam anti-sex?' As authors, academics and advocates working on sexual rights in the Islamic world, it is a question that we have been asked countless times. And not just by non-Muslims. It is no wonder that our fellow believers are also perplexed: every day brings new headlines of sexual intolerance and repression from the Muslim world. Take, for example, regular pronouncements from ISIS invoking Islam to 'justify' the sexual exploitation of Christian women as 'concubines' and the execution of gay men in regions under its reign of terror (Amnesty International 2014),<sup>1</sup> or the use of Hudood ordinances and criminal procedure laws in Pakistan for sexual crimes whose prosecution and penalties fall heaviest on women (see Human Rights Commission of Pakistan 2015: 52). Or, for instance, the recent wave of arrests and sentencing of transsexuals by Egypt's new government and its practice of sexual torture to break opponents (FIDH 2015). Or Iran's rolling back access to contraception and abortion (Amnesty International 2015), or Islamic states banding together under the banner of the Organisation of Islamic Cooperation (IOC) to block

any advance on sexual rights at the United Nations (see Chase 2015; Rehman and Polymenopoulou 2013). For more examples of state regulation in the Islamic world, see Hélie and Hoodfar (2015).

The Islamic world is vast and varied, with as much diversity within borders as there is across them. Yet running right through is a hard and fast rule: the only socially accepted sexuality is strict heteronormativity, its cornerstone family-endorsed, religiously sanctioned, state-registered marriage. It is a social citadel, like those impregnable fortresses which once braced the Islamic world, from Marrakech to Kashgar, resisting any assault, any challenge to the sexual status quo (El Feki 2014). And around the citadel lies a vast terrain of taboo – against premarital sex, homosexuality, unwed motherhood, abortion, sex work – and a culture of censorship and silence, preached by religion, buttressed by law and enforced by social convention.

As practising Muslims, who have collectively spent decades studying the shifting sexual landscape of the

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Arab region and South-West Asia, we know our faith is not anti-sex. Far from it: Islam, in its essence, recognises the power of sex; so much so that it seeks to channel it into certain structures – one of which is marriage – for fear of social disorder. Nor are Muslims *a priori* ‘anti-sex’, for all their hard line in public opinion polls; in private, there are millions outside the citadel getting on with their sexual lives (Pew Research Center 2013).

The problem is an unholy alliance between politics and religion. In its historical heartlands, Islam is embedded in power structures that are staunchly authoritarian. They are also patriarchal, and the power of the father of the nation – be he a king, or a dictator or a mullah – is reflected in the authority of the father of the family. These structures are, by their very nature, conservative, if not fundamentalist. They are keenly aware of the powerful combination of sex, wrapped up in religion, as a tool of social control – especially when trained on women and youth. As regimes across the Islamic world increasingly find themselves under pressure, inside and out, they increasingly crackdown on sex in the name of religion – tactics fuelled more by realpolitik than morality.<sup>2</sup>

“The problem is an unholy alliance between politics and religion.”

The Islamic world is by no means alone in this bind: just look at recent furores over homosexuality in Uganda or sex work in Canada or abortion in Paraguay. But some features stand out. Sex is bound up in shame – particularly for women – which makes it a powerful tool of repression, one which authorities use to devastating effect. Diversity does not do well in authoritarian systems, so those who fail to conform to norms – sexual, social or otherwise – find little tolerance in most quarters. The right to a safe, satisfying and pleasurable sexual life, free from violence, discrimination or coercion, is hard to exercise when family interests trump individual choice. And when appearance counts for more than reality, in all aspects of life; when prostitution masquerades as marriage between wealthy tourists and desperate refugee women; or when virginity is defined by a piece of anatomy (an intact hymen) rather than a state of chastity.

## 2 Back to the basics: law, politics and religion

This marriage of politics and religion is clear in the stance adopted by many governments in the Islamic world, as well as that of fundamentalist non-state actors, such as ISIS, the Taliban or Al-Qaeda. In repressing sexual rights, these governments and non-state entities draw on Islam, legitimising and legislating on the basis that such actions are divinely ordained and must be enforced as part of God’s

law, the Sharia. The Sharia is divine and immutable according to Muslim thought, whereas *fiqh* – that is the laws and administrative practices which make up Islamic jurisprudence and are used to apply and enforce the Sharia – has throughout history been politically motivated and engineered to advance the interests of rulers and a powerful governing elite (Rehman 2005: 10).

The Qur’an (the Holy Book, which according to Muslim belief, represents the accumulation of the verses revealed by God to Prophet Muhammad) and the Sunna of the Prophet Muhammad (model behaviour, referred to as the tradition and practices of the Prophet Muhammad) are primary sources of the Sharia; both present a range of positive views of sexuality and sexual rights. The Qur’an, in the words of Abdelwahab Bouhdiba, a distinguished commentator on Islam and sexuality, ‘abounds in verses describing the genesis of life based on copulation and physical love. This is because sexual relations are relations both of complementarity and pleasure’ (Bouhdiba 2008: 8). The Holy Book provides substantial evidence of the value of positive sexual experiences and sexual pleasures. Indeed, the Sharia discusses, in detail, sexual practices between spouses, who are described in the Qur’an as ‘garments’ fitting each other. In addressing believing men, the Qur’an notes that their wives ‘are clothing for you and you are clothing for them... So now, have relations with them and seek that which Allah has decreed for you’ (*Sura II: Al-Baqarah*, verse 187). Sexual pleasure is an integral part of marriage and, importantly, sexual intercourse as the consummation of marriage is a condition of its validity; indeed, a single word, *nikah*, applies to both marriage and coitus.

According to the Sharia, the sexual duality of those joined in *nikah* is a form of sacred relationship. Furthermore, God commands, ‘O mankind, fear your Lord, who created you from one soul and created from it its mate and dispersed from both of them many men and women’ (*Sura IV: An-Nissa*, verse 1). The Qur’an signifies a sense of complementarity in sexual relations between men and women, both needing each other to enjoy and relish this blessing from God Almighty.

Not only do the Qur’an and Sunna firmly encourage a positive view of heterosexuality, but in a number of instances, they also assert the value of human diversity based on physical, gender and sexual attributes. In *Sura Ar-Rum* of the Qur’an, God Almighty notes that He created human beings with different *alwan*, a word that has the dual meaning of ‘colours’ and ‘tastes’ (*Sura XXX: Ar-Rum*, verse 22). These differences can be read to mean to include sexual variation, that is, different orientations or gender identities; human diversity, in this interpretation, encompasses sexual diversity as well. On a number of occasions, sexual diversity is portrayed within the *Sharia* as evidence

of God's powers. One such example can be found in the Quranic *Sura An-Nur* (The Light), which states:

And say to the female believers to cast down their beholdings, and preserve their private parts, and not display their adornment except such as is outward, and let them fix [literally: strike] closely their veils over their bosoms, and not display their adornment except to their husbands, or their fathers, or their husbands' fathers, or their sons, or their husbands' sons, or their brothers, or their brothers' sons, or their sisters' sons, or their women, or what their right hands possess, or (male) followers, men without desire [literally: without being endowed with 'sexual' desire]<sup>3</sup> or young children who have not yet attained knowledge of women's privacies, and they should not strike their legs [i.e. stamp their feet] so that whatever adornment they hide may be known. And repent to Allah altogether, (O) you believers, that possibly you would prosper (*Sura XXIV: An-Nur*, verse 31).

In a strictly gendered and hierarchical society, the full implications of this verse are rarely followed to their logical conclusion. Believing women are asked to lower their gaze and be modest and not to reveal their adornments to the public. However, among the select group of men to whom this restriction does not apply are those 'who have no desires for women'. These men, by definition, could include homosexuals, eunuchs, men with no sexual drive, or the impotent. Furthermore, the Qur'an recognises that there are people who are neither men nor women:

To Allah belongs the dominion of the heavens and the earth; He creates what he wills. He gives to whom He wills female [children], and He gives to whom He wills males. Or He makes them [both] males and females, and He renders whom He wills barren. Indeed, He is Knowing and Competent (*Sura XLII: Ash-Shura'a*, verses 49–50).

One interpretation of the above verses is that the Almighty in all his powers can combine male and female characteristics. And so, it can be understood that the Sharia recognises the existence of varying sexual and gender expressions. Such dynamism is remarkable, and a passion for sexually diverse communities has encouraged Muhsin Hendricks, a South African imam and outspoken advocate of lesbian, gay, bisexual and transgender (LGBT) rights within Islam, to make the observation that:

Themes in the Quran such as social justice, gender equity, inclusiveness of different faiths, diversity in humanity, the prophetic example and a forgiving and merciful God, make it difficult to dismiss people of different sexual orientation or gender identity who have played a significant role in many civilisations. Taking stock of the contribution that homosexuals and transgendered people have for

centuries had to the growth of humanity, it is a mistake and contrary to the core principles of the Quran to perceive these classes of people as detrimental to social institutions such as marriage, the family and even society as a whole (Hendricks 2010: 43–44).

An affirmative view of sexuality and sexual pleasure is also evident from the Sunna of Prophet Muhammed. As a young man, the Prophet had a fruitful sexual life with his first wife, Khadija, and after her death, with subsequent wives throughout his long life. Many authenticated *hadith* (that is, report of the words and deeds of the Prophet Muhammad) attest to his interest in sexuality and sexual behaviour. The Prophet is, for example, reported to have said that 'the man who marries takes possession of half of his religion' (cited in Bouhdiba 2008: 11, Note 11).

In addition to the available information related to the Prophet's experiences (and views) of heterosexuality, there is considerable documentation on men with alternative gender expression in early Islamic Arabia. There are numerous accounts of interaction between *mukhannathun*, that is, effeminate men, and the Prophet. As Everett Rowson, a noted scholar of medieval Islamic sexuality observes, these men were not homosexual *per se*, but rather, 'unlike other men, these effeminates or *mukhannathun* were permitted to associate freely with women, on the assumption that they had no sexual interest in them, and often acted as marriage brokers, or, less legitimately, as go-betweens' (Rowson 1991: 671). Various reported incidents demonstrate the compassion and understanding of the Prophet in his interaction with effeminate men. The liberal approach is confirmed by the Prophet allowing effeminate men to work in his household and permitting them to enter the women's quarters and deal with his wives. The reported *ahadith* (plural of *hadith*) suggest that the Prophet never recommended death, or violence towards effeminate men.<sup>4</sup>

The aforementioned Prophetic traditions and the Qur'anic ordinances endorse the Sharia's positive interest in aspects of sexuality and sexual diversity. While there is no doubt that sexual expression and sexual conduct must be performed within the bounds of the Sharia, controversy surrounds the limits that have been drawn. Thus, for example, some of the Qur'an's context-specific verses have been interpreted by theologians and jurists to undermine women's rights and justify the subordination and subjugation of women's bodies and sexuality.<sup>5</sup> These include child marriage (particularly that of young girls),<sup>6</sup> forced or polygamous marriages,<sup>7</sup> violence and brutality by male family members or husbands,<sup>8</sup> unilateral divorces by husbands<sup>9</sup> and denial of custody and guardianship rights. This gender-discriminatory bias is exacerbated through the male domination of Islamic structures and institutions charged with official interpretation. An

age-old male fear of women's sexuality is reflected in deliberate, conscious efforts to repress women's sexuality and sexual rights. Women's sexuality is perceived as dangerous and likely to bring shame on the community or the family if not constrained. Family honour is so inextricably connected to the woman's body, her sexuality and behaviour that perceived sexual misconduct can only be redeemed through violence and brutality. Mazna Hussain, a US-based human rights lawyer, makes the valid point that:

Because of this vesting of such a socially crucial male interest in the body of a woman, men accord themselves complete authority and control over their female family members in order to protect their interest. Consequently, where a woman takes her sexuality in her own hands, or even exercises independent freedom to act, she disturbs this conception, and the male responsible for controlling her then becomes 'ungendered'. A man may be considered effeminate by his peers if he does not take authoritative action to re-assert his authority over a transgressing woman; it is through an act of violence towards the woman that he demonstrates the power of his masculinity (Hussain 2006: 227)

These apparent sexual misdemeanours by women continue to result in emotional and physical violence, including honour killings. The use of such violence in controlling female sexuality is a tool of deterrence and maintenance of the social order that is supported and reinforced by prevailing religious dogma. In many

settings, killings in the name of 'honour' or 'izzat' are condoned by the family and community as well as by state institutions. In patriarchal systems, law enforcement agencies and the courts tend to be more sympathetic towards the perpetrators of honour crimes, who are seen as upholding the desired order of things. For example, laws such as Pakistan's *Qisas and Diyat Ordinance* (1990) allow male perpetrators of crimes against women to avoid punishment through payment of 'blood money' as compensation or through forgiveness by male elders of the victim's family.<sup>10</sup>

Just as women's liberation and sexuality is anathema to the political elite in many Muslim-majority states, there is an equally strong aversion to granting rights to sexual minorities, in particular homosexual and transgendered individuals. Sexual equality, including freedom of sexual expression and formation of sexual partnerships outside of state-endorsed marital frameworks, challenges the status quo and is unacceptable to these authoritarian, patriarchal regimes. Those found to overstep the boundaries of sexual conduct face the full wrath of these regimes in the form of persecutions, imprisonments, beatings and death. It is not surprising that all five states that currently punish same-sex relations by the death penalty are Sharia-compliant (Iran, Yemen, Saudi Arabia, Mauritania and Sudan). The death penalty is also applied in the northern region of Nigeria, which has predominantly Muslim populations, and the southern parts of Somalia. Muslim-majority states reserve the most brutal punishments, including lashing and public



► A man stands on the balcony of a mosque beside the Buriganga River in Dhaka, Bangladesh.

stoning, as well as arbitrary executions for homosexual conduct: these include Iran, Yemen, Saudi Arabia, Sudan, Qatar, Pakistan and Afghanistan (see Simon and Brooks 2009; Sofer 1992). Some of the Muslim-majority states which impose life imprisonment (for example, Maldives) do so on the basis of the Sharia injunctions.<sup>11</sup> Furthermore, the Muslim-majority states that criminalise same-sex relationships have also proved to have the highest levels of homophobia and intolerance towards sexual diversity (see Beckers 2010: 79; see also *The Economist* 2012; Khan 2010; Von Mittelstaedt and Steinworth 2009).<sup>12</sup>

### 3 Long road ahead

'Just say no' is how conservatives around the world respond to any challenge to sexual norms. In Muslim-majority countries, they tend to brand such attempts a 'Western' conspiracy to undermine so-called traditional 'Islamic' and local values. The irony, is that for much of their history, Islamic cultures were famous not for their sexual reticence and intolerance, as they are today, but for quite the reverse. As noted above, the Prophet Muhammad came in for particular censure from generations of Christian critics, his conjugal arrangements and connubial bliss, as well as a steady stream of advice to newly minted Muslims on everything from the necessity of foreplay to the permissibility of birth control to the undesirability of anal sex, taken as proof positive of his imposture.

The Prophet set the tone for a long and distinguished tradition of writing in Arabic, Urdu and Farsi on sex – literature, poetry, medical treatises and self-help manuals. Many of these great works were by religious scholars who saw nothing incompatible between the needs of the flesh and the exigencies of the faith. Indeed, it behooved these men of learning to have as full a knowledge of sexual practices and problems as they did of the intricacies of Islam. There is precious little in *Playboy*, *Cosmopolitan*, *The Joy of Sex*, or any other taboo-busting work of the sexual revolution and beyond that this literature did not touch on over a millennium ago.

Take, for example, the work of 'Abd al-Rahman al-Suyuti, a fifteenth-century Egyptian thinker. Al-Suyuti is a leading light in the history of Islamic scholarship, thought to have written more than 500 works of Qur'anic exegesis, collections of *hadith*, commentary on Islamic jurisprudence, and much more. He also had a lively sideline in erotica, with more than half-a-dozen works on sexual anatomy, techniques and terminology. Although he took a harder stance on homosexuality than some of his predecessors, Al-Suyuti nonetheless retained their central message: sex is God's gift to mankind and we are meant to enjoy it. Al-Suyuti himself celebrated such pleasures in one of his more engaging works, an entertaining collection of stories in which various professionals of

the day – including several religious figures – describe their sexual experiences, so as to encourage readers to make the most of their own wedding nights. Among them is a sprightly account from one mosque official, who proudly noted:

I showed her my rod of iron, Whose dimensions were vast in girth and length. O marvellous tool, handy, healthy, firm, erect! A tool which, if it were a minaret, would allow the dead to hear the call to prayer (Al-Suyuti, 1972: 86–87).

It's hard to imagine Al-Suyuti's twenty-first-century successors taking a similar tone. It is not a coincidence that the golden age of Arabic erotica, from the ninth to the thirteenth centuries, also coincided with the zenith of political, economic and cultural power in the Abbasid dynasty. The confidence and creativity of Arab and Islamic civilisations was once reflected in their relative ease with sexual life. The winding down on sex occurred over centuries, and as in many other parts of the global South, gained ground with the coming of European colonisation. And it has picked up the pace since the late 1970s, the rise of Islamic fundamentalism catalysing a tightening of interpretations around, and widening of efforts to control, gender roles and sexuality. But history shows us that, as recently as our fathers' or grandfathers' day, there have been times of greater tolerance, and pragmatism, and a willingness to consider other interpretations when it comes to sexual life. It is not black and white as Islamic fundamentalists maintain; on these and other matters, religion and culture offer at least 50 shades of grey.

Around the world, there is a new generation of Muslims exploring this spectrum, encouraged by broader debates over the future of Islam which are themselves stemming from the sinking fortunes of political Islam in some countries, and the rising tides of Islamic extremism in others. There is also a realisation among many sexual rights advocates in Islamic communities that however much they might want to take religion out of the picture, a secular sexual revolution is not on the cards. Most people in our communities – particularly young people, raised in the shadow of fundamentalism – want to live their lives, in and out of the bedroom, along the grain of religion and culture.

Having collectively spent decades working with religious leaders across the Islamic world on aspects of sexuality, we know the challenges of shifting positions. It is easy to forget that men and women of God do not themselves possess God-like knowledge or powers. Products of the same culture of silence and shame around sex as their congregants, they are, often by their own admission, largely ill-informed about sexual matters beyond the basic facts of life, and this ignorance often pushes them to take the safest (and generally, most conservative) line. Moreover, they too are under



peer pressure, and no matter how much they might wish to take a different approach, it is hard to break with the party line when you live with a congregation which holds strong views to the contrary.

Nonetheless, there have been a number of small but successful attempts to work within an Islamic framework to change attitudes and behaviours towards certain aspects of sexuality. UNICEF and United Nations Population Fund (UNFPA), for example, have collaborated extensively with Islamic leaders in Burkina Faso and Sudan to dispel common misconceptions around the religious permissibility of female genital mutilation, a traditional practice aimed at regulating female sexual desire, bolstered by selective Islamic interpretation (UNFPA 2014). Islamic leaders in Lebanon, for example, have spoken out

“As practising Muslims, we believe that sexual rights are compatible with Islam, but this depends crucially on believers having the freedom to think and act for themselves.”

against domestic violence – often argued away on Islamic grounds as a man’s God-given right to discipline his wife.<sup>13</sup> And in Morocco, a recent directive from King Mohammed VI, who is also the country’s highest Islamic authority, to ease restrictive abortion laws has encouraged religious leaders to look to more open readings of *fiqh*. The result was a slight liberalisation of the legal grounds for termination, beyond risks to a women’s health or life to also include rape, incest and fetal abnormalities (El Feki forthcoming).

In our experience, it is easier to engage the religious establishment on questions of sex when it is wrapped in the white coat of public health – disease or dysfunction or violence – than on the thornier questions of sexual rights. And so there is a gap emerging between progressive Islamic scholarship and activism on sexual rights on the one hand, and the Islamic powers that be on the other. Case in point is the blossoming field of Islamic feminism, where groups such as Sisters in Islam in Malaysia<sup>14</sup> or Musawah, an international network of academics and activists (see, for example, Mir-Hosseini, Al-Sharmani and Rumminger 2015), are advancing new readings and interpretations to counter conventional Islamic teachings as they relate to women, such as the permissibility of marital rape or child marriage – and facing fierce resistance in return.

Nowhere is this divide clearer than in the incendiary topic of LGBT populations. As discussed above, there is a growing body of alternative Islamic scholarship on homosexuality and transgender identity, much of it originating from academics outside Muslim-majority heartlands; while this work has little traction in conventional Islamic circles, it is offering a growing

number of LGBT Muslims a hope of reconciling faith with desire. Groups such as Inner Circle in Cape Town, or Paris’s ‘gay-friendly mosque’, for instance, are opening new spaces for LGBT Muslims to exercise their faith and find a place still sorely lacking in mainstream Muslim communities (Kugle 2013).

As practising Muslims, we believe that sexual rights are compatible with Islam, but this depends crucially on believers having the freedom to think and act for themselves. And we are still a long way from that in the Islamic world. At the end of the day, it is not religious leaders with their vested interest in the status quo who will open space around sexuality, but individual Muslims with the information and the incentives to ask hard questions of today’s received wisdoms. The core principles of Islam – justice and dignity, tolerance and privacy – are as important inside the bedroom as they are beyond it; if we do not anchor them in the one, then they will prove elusive in the other.

#### Endnotes

<sup>1</sup> ISIS (Islamic State of Syria and Iraq), also called ISIL (Islamic State of Iraq and the Levant).

<sup>2</sup> See papers by Aston Paiva and Nisha Ayub in this section.

<sup>3</sup> Other translations: ‘male servants who lack sexual desire’, in Deuraseh (2008: 94).

<sup>4</sup> See Sahih Al-Bukhari, The Hadith Book 72, Volume 7, Number 775, available at [www.luvu4luv.com/Hadith\\_Bukhari\\_Book72.html](http://www.luvu4luv.com/Hadith_Bukhari_Book72.html) (accessed 28 July 2015). See also Volume 7, Book 72, Number, 774; Book 62, Number 162; Volume 5; Book 59, Number 613. Also see Kugle (2010: 92).

<sup>5</sup> Frequent reliance has been placed on the following verse: ‘men are in charge of women by [right of] what Allah has given one over the other and what they spend [for maintenance] from their wealth. So righteous women are devoutly obedient, guarding in [the husband’s] absence what Allah would have them guard. But those [wives] for whom you fear arrogance – [first] advise them, [then if they persist], forsake them in bed, and [finally], strike them. But if they obey you [once more], seek no means against them. Indeed, Allah is ever Exalted and Grand’ (The Qur’an, *Sura XXIV An-Nur (The Light)*, verse 34).

<sup>6</sup> Classical Islamic schools of *fiqh* grant authority to the male parent or the guardian (*wali*) to enforce child marriages, with the so-called option of puberty. This means that a guardian’s powers to agree to a child marriage would come to an end once that child had attained the age of puberty, when he or she could invoke this ‘option’ in order to rescind the marriage, so long as the union had not been consummated. See Fyze (1974: 208–209); Pearl and Menski (1998: 157).

<sup>7</sup> See the *Muslim Family Law Ordinance 1961* (Ordinance No VIII of 1961); also applicable in Bangladesh in conjunction with the *Muslim Marriages and Divorces (Registration) Act 1974* (Act No LII of 1974). For an analysis see Rehman (2007).

<sup>8</sup> Note the interpretations of certain Qur’anic verses e.g. *Sura XXIV An-Nur (The Light)*, (verse 34) to justify violence against women, particularly in cases of misbehaviour including sexual misconduct.

<sup>9</sup> See the *Muslim Family Law Ordinance 1961* (Ordinance No VIII of 1961).

<sup>10</sup> For an insightful analysis of the *Qisas and Diyat Ordinance* (1990) and the Criminal Law Act (2004), see Lari (1990).

<sup>11</sup> The Maldivian Penal Code does not explicitly regulate sexual conduct, 'homosexual acts' being merely an 'arrestable offense'; however, the punishment for homosexual acts under the unwritten Islamic laws (and applied by the judiciary as such) includes imprisonment, lashing and house confinement. The contentious *Sexual Offences* bill originally drafted in 2012 and aiming to codify sexual offences including homosexuality remains pending before the Maldivian Parliament. See Minivan News (n.d.).

<sup>12</sup> See also Amnesty International's reports, [www.amnesty.org/en/sexual-orientation-and-gender-identity](http://www.amnesty.org/en/sexual-orientation-and-gender-identity) (accessed 29 October 2015); [www.amnesty.org/en/latest/research/?contentType=2564&issue=1589&sort=date](http://www.amnesty.org/en/latest/research/?contentType=2564&issue=1589&sort=date) (accessed 29 October 2015).

<sup>13</sup> See the work of ABAAD, a Lebanese NGO engaging men and boys against gender-based violence at [www.abaadmena.org](http://www.abaadmena.org) (accessed 21 December 2015).

<sup>14</sup> See [www.sistersinislam.org.my](http://www.sistersinislam.org.my) (accessed 17 October 2015).

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# Violence Against Women, Criminalisation, and Women's Access To Justice in Ecuador and Latin America

SILVANA TAPIA TAPIA

## 1 Introduction

The universalisation of the penal response as the main, and sometimes the only, legal mechanism to address social violence has long been questioned. Some criminologists have linked the expansion of penalty – understood as the wholeness of the penal complex, including legal provisions, procedural rules and sanctions – to the practices of neoliberalism and the decline of the welfare state (Garland 2012; Wacquant 2009). In the field of violence against women (VAW) feminists have also associated state practices in the field of VAW – such as medical and psychological intervention, penalisation and security discourses – to a neoliberal focus on individual responsibility and technical approaches to social policy (Bumiller 2008; Gotell 1998, 2007). In addition, feminist critique has addressed the role that feminist politics are playing in the growth of punitivism and linked certain practices of feminist transnational governance, which rely on the contemporary discourse of human rights, to the emergence of a 'carceral feminism' that centres penalty as a strategy to tackle gendered violence, particularly regarding trafficking, prostitution and rape (Bernstein 2012; Halley 2008).

Of course, penal expansion is not an issue that emerges only in the context of feminist strategies. It has been noted that states frequently find in criminal law a relatively 'easy way out', as expanding the catalogue of criminal offences is relatively simpler than adopting integral programmes of action or funding social welfare measures that target the roots of social violence (Gotell 1998); but also, civil society often appears to demand harsher penal laws. Environmentalist movements, for instance, have also campaigned for the creation of environmental crimes as a way to materialise their demands (Zaffaroni 2011). It looks as if, to the extent to which the protection of rights is linked to the threat

of imprisonment for their violation, all rights-based projects would be 'carceral'. It is thus important to ask to what extent the success of criminalisation processes responds to the universalisation of penalty as the preferred state response. More concretely, beyond the question of feminism as a reproducer of carcerality, it is also crucial to ask what is the role of penalty, as a field of intelligibility, in shaping the strategies of social movements, including feminist ones, and to what extent the processes of negotiation of feminist-inspired penal reform have entailed a reframing of feminist demands into state-led legal discourses.

Furthermore, while the insights from the literature referred to above are indeed helpful to understand criminalisation trends, not all the premises are applicable to regions outside the so-called global North; such is the case of Latin America and Ecuador, whose case I address in this article. There are a number of underexplored issues that emerge at this particular geopolitical context: importantly, several Latin American countries have recently undergone processes of political change, performing a 'turn to the left' that has resulted in the emergence of a so-called pink tide, a wave of progressive regimes that have been regarded as committed to social welfare.<sup>1</sup> While said regimes have proclaimed a break with neoliberalism and, at least rhetorically, linked their programmes to the goals of social movements that have long resisted it, no substantial change seems to have resulted from this break in regards to penalty and the expansion of criminal law. Moreover, carcerality has increased in several of the pink tide countries, including Ecuador (Sozzo 2015). This, together with an ambivalent response from these governments to issues of gender (Kampwirth 2011; Lind and Keating 2013), invites us to rethink criminalisation as a technology that prevails despite significant political change, and that does not necessarily have a positive impact upon the materialisation of women's rights.

In effect, the reproduction of carcerality through feminist practice may not be the most urgent issue to tackle in this context in relation to VAW. For sure, Latin American feminist campaigns have, particularly since the 1990s, included important appeals to legal reform

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◀ A woman stands by a door after peeling shrimp at a fish market on the island of Limones, in the Esmeraldas Province in Ecuador.

and successfully achieved the penalisation of previously non-criminalised conducts, such as intimate-partner abuse. Nevertheless, not all feminist campaigns in the region have revolved around criminalisation. Mobilising for the decriminalisation of abortion, for instance, which evidently contests penalty, is an ongoing struggle that has thus far achieved little success. Moreover, there is little evidence to suggest that the criminalisation of VAW has in reality impacted the rise in carcerality, while VAW legislation has actually provided certain tools, such as restraining orders, that at least some women have been able to use in order to alleviate situations of violence. This is not to say that criminalisation strategies are unproblematic. In 2014, a new penal code was enacted in Ecuador following the passage of a new Constitution in 2008, which was promoted by the new left-leaning regime. The code criminalised forms of gender violence that had hitherto been considered misdemeanours and additionally created a new offence, femicide. On the ground, these provisions appear to be hindering women's possibilities of accessing justice, as the available legal mechanisms are now subordinated to the formalities and logic of a cumbersome penal process. This again invites us to interrogate criminal law as a feminist strategy and to reflect upon its potential effects on the lives of women.

Merry (2003: 353) has noted that the successful enactment of legal subjectivities depends on 'being the rational person who follows through, leaves the batterer, cooperates with prosecuting the case and does not provoke violence, take drugs or drink, or abuse children'. Feminist criminologists have also interrogated the problematic effects of criminal procedures for women who attempt to access justice

(Douglas 2008; Mills 2009; Snider 1994, 1998). Drawing from these insights and relying on my own analysis of legal provisions, parliamentary debates, draft bills and interviews maintained during fieldwork with feminists who have been involved in these processes, I analyse the legal reform projects that have led to the criminalisation of VAW in Ecuador, situating the case in the context of Latin America. I reflect upon the ways in which negotiating women's rights through criminal law have resulted in reaffirming dominant constructions of subjectivity and womanhood, also deepening the breach between legal provisions and the lived experiences of those who attempt to use them. It is suggested that, on behalf of the measurable progress of legal reform, a feminist strategy focused only or mostly on penalisation can facilitate the depoliticisation of women's emancipatory struggles, allowing a dominant discourse and a pre-established set of principles to construct women's experience in a way that restricts rather than broadens their chances to obtain a response from the legal system.

## 2 Legal approaches to violence against women in Latin America

Violence in domestic spaces is a problem that has been addressed by states in Latin America, prior to the consolidation of the feminist movements that disseminated the notion of sexual violence and gender-based violence as political issues. Despite a common narrative that the state has been 'blind' to the violence that takes place in private spaces, historical accounts of the politics of gender in post-colonial Latin America show that intervening in the family has long been part of the nation-making projects



that began in the region after the independence wars (Dore 2000a). Feminist historians have also shown that these processes of nation-making were racialised and gendered (Clark 2001; Guy 2000b; Molyneux 2000; Radcliffe and Westwood 1996) and that the family has been a central site of normalisation as a space where national identity and citizenship are built in relation to ideals that often revolve around Europeaness. States, therefore, have not been alien to the question of violence in the family and have historically promoted the protection of women and children through policies and legislation designed to limit patriarchal power when it results in excessive violence (Dore 2000b; Guy 2000a; Rodríguez 2000). These interventions built on the rationality that the wellbeing of the family determines, to a great extent, the wellbeing of the nation. As will be shown later, framing violence against women as a matter of protecting the family continues to be an important rationality upholding state interventions in the home.

These early interventions in domesticity constitute a precedent of practices that aim at policing violence in intimate spaces, but they were, of course, qualitatively distinct from the proposals that, later, feminists would present based on a politicised understanding of VAW as an effect of asymmetric power relationships between genders. While early manifestations of feminism have appeared in the region since the early twentieth century, the 1970s are identified as the years of emergence of distinct women's movements (Miller 1991), and the 1980s and 1990s marked the consolidation of transnational activism and campaigns (Mendoza 2002).

International and transnational instances have contributed to the dissemination of discourses that approach VAW from a technical perspective, urging states to deploy public policy to tackle the issue. VAW has often been posited as an obstacle to women's incorporation in development (e.g. Economic Commission for Latin America and the Caribbean 2015) and also as an issue of public health, at times moving the focus from the political underpinnings of gendered violence that feminists exposed, to the discrete locations from where the state agencies can intervene in a technically informed fashion (Bacchi 1999). The World Health Organization (WHO) and the Pan American Health Organization (PAHO), for instance, have supported the enactment of VAW legislation and policy (e.g. Pan American Health Organization, 2015) and implemented campaigns to raise awareness not only among women, who are encouraged to look after their own health, but also to train health staff to recognise, treat and report domestic violence. In many ways these discourses have modernised and rationalised intervention in the family, providing a foundation that allows governments to look at VAW as a 'real' public interest problem – as opposed to merely

a narrative produced by feminist ideology – which has in turn facilitated the reception of legal reform projects at national legislatures. In other words, discourses such as public health and development have contributed to the representation of VAW as relevant to the interests of broader governmental projects, that is, a problem that has a social cost.

An important characteristic of feminist action in Latin America in the field of VAW is the protagonism that non-governmental organisations (NGOs) have had in designing policy proposals and campaigning for their implementation. Sonia Alvarez (1998, 1999) has analysed the role that NGOs have had in the professionalisation and specialisation of feminist activists, and referred to these processes as the 'NGOisation' of feminism. Indeed, NGOs have constituted a crucial 'bridge' between international and national spaces, providing capacity-building and training for their staff as well as services for the community, including assistance in issues such as reproductive health and legal counselling. International organisations have found effective allies in local NGOs and funded many of their projects, including those that have revolved around consultancy for policy design. Across the region, NGOs have engaged in promoting and monitoring gender-related legislation by working with women parliamentarians, grass-roots leaders, judges and legal professionals, and engaging in strategic litigation aimed at advancing jurisprudence (see for instance CLADEM 2015).

As said above, many processes at the international level facilitated the successful creation of novel VAW legislation at the national level. It has been noted, however, that the approach that gradually became dominant in the international instances – and was mainstreamed and adopted at the national level – had shifted from a welfare-oriented treatment of violence against women that was more common until the late 1980s to one that prioritised criminal justice interventions and recommended states to perform criminal law reforms (Joachim 1999, 2007).

The main international precedents for the 'boom' in VAW legislation in Latin America were the adoption of the United Nations Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the reports from the UN's world conferences on women, the 1995 Beijing Platform for Action and, regionally, the passage of the Belém do Pará Convention, a binding instrument focused on rendering states accountable for preventing and punishing VAW. It was promoted by the Inter-American Commission of Women and adopted by the general assembly of the Organization of American States in 1995. These processes helped consolidate the idea that women's rights are human rights, and they served the purpose of exerting pressure upon states to enact domestic laws that responded to

international recommendations. In effect, specialised laws penalising VAW were enacted in virtually every country of the region during the 1990s following the models and principles produced through the international processes.<sup>2</sup>

### 3 The first law against violence towards women and the family in Ecuador

The first law that regulated VAW in Ecuador was Act 103, in force since 1995. It was initially conceived as a law that would provide a specialised, rapid legal procedure for women to report events of domestic abuse. The new law framed these events as misdemeanours rather than criminal offences.<sup>3</sup> However, it was decided during the parliamentary debates that the existing provisions that penalised misdemeanours consisting of physical injury – defined in the ordinary penal code – also had to be applied to define and judge those injuries that resulted from domestic abuse. In this way, Act 103 relied on the ordinary penal code when it came to physical violence. Psychological and ‘mild’ sexual violence (those cases that did not result in physical harm and were not already categorised as crimes such as rape or sexual assault) were forms of aggression that could not be framed through pre-existing legal provisions and were thus, in practice, the only novel concepts introduced by Act 103. For these types of violence, the law prescribed a specialised procedure and corresponding pecuniary (civil) sanctions for these misdemeanours. If evidence that a serious criminal offence had been committed was found, commissioned authorities were bound to redirect the file to a general criminal court. In this way, by combining civil and penal mechanisms, the law functioned as a hybrid instrument that provided women with a specialised procedure to follow, but that was also connected to the ordinary penal legislation and process.

The approval of Act 103 was the result of the coordinated efforts of women’s civil society organisations, professional networks and NGOs. The text was drafted by feminist lawyers who were experienced in working with violence survivors at the services provided by women’s NGOs. The drafts for Act 103 were discussed among the representatives of various women’s organisations and the proposal was supported by the National Women’s Bureau, the state women’s office that operated at the time. As several activists have told me, the project was *owned* by the movement and its materialisation celebrated as a historical achievement.

However, the run-up to its enactment was not a process of unconditional acceptance of women’s proposals. For instance, the draft had originally been named ‘law against violence towards women’, while the expression ‘and the family’ was added

after the preliminary negotiations, at the request of congressmen who alleged that a law for the protection of the family was better placed strategically than a law targeted at women alone. In this way, the legal meaning of VAW was constructed as synonymous with family violence and linked to the realm of the home. The law was basically designed to intervene in heterosexual intimate-partner violence within a familial context; other expressions of gender-based violence, such as police aggression against sex-workers or violence and harassment in the workplace to name just some examples, were not contemplated by the Act. During the parliamentary debates, some articles of the draft were changed, ensuring that the described infractions – psychological, physical and sexual violence – covered other members of the family and not exclusively women (Congreso Nacional del Ecuador 1995).

At this stage it is possible to appreciate that women’s demands needed to be reframed in order to be successfully converted into legal provisions. While the linking of women’s integrity to family wellbeing may have been strategically used by activists and campaigners to obtain beneficial legislation, it also reaffirmed narrow representations of gender roles and fixed definitions of the legal subjectivity that needs to be enacted in order to call upon legal protection. As Molyneux (2000) notes, various state agencies in most Latin American countries have pursued an agenda to promote women’s interests through egalitarian initiatives, but at the same time they have declared their purpose of promoting and protecting the family, implying that both are inextricably related or necessarily coincide.

However, despite the fact that Act 103 was officially a family violence law, in practice the vast majority of complainants were women. A thorough, systematic analysis of the complaints filed while Act 103 was in force has never been carried out, but partial analyses of the information collected by the commissariats at the main cities show that between 86 and 95 per cent of the reports were filed by women (Jácome Villalba 2003). Violence against children, in turn, continued to be managed by previously established children tribunals. This situation shows that there was a gap between the way in which the law framed

“The law was basically designed to intervene in heterosexual intimate-partner violence within a familial context; other expressions of gender-based violence, such as police aggression against sex-workers or violence and harassment in the workplace ... were not contemplated by the Act.”

violence, and the way provisions functioned in reality, when people made use of them.

Act 103 mostly operated as a set of pre-emptive measures with a potential to prevent violence from escalating. One or more of the protection measures it established – including the prohibition on the offender to approach the complainant at her home, study or workplace – were regularly requested by women who demanded restraining orders to escape their abusers (Tamayo 1998; Valdivieso and Armas 2008). These measures were granted on most occasions, because the presentation of evidence was not required in order to issue them; that is, they could be conceded straight after a complaint had been filed, meaning that women's accounts of violence were presumed truthful. This was important, given that domestic abuse usually takes place at home and without witnesses. But most of the time, women would abandon the procedure at its first stages, right after the protection

measures had been issued. According to different estimates, only between 4 and 11 per cent of reports ended with a sentence or resolution (Jácome Villalba 2003; Jubb 2008). This was generally regarded by women's organisations as a failure of the law itself and of the judiciary system. Certainly, from the perspective of the amount of obtained finalised procedures, the law can be considered ineffective. But this could also be read as a sign that most women did not intend to pursue the punishment of the offender – generally someone they depend upon emotionally, economically, etc. – but rather the ceasing of violence. Act 103 was therefore rarely a cause of imprisonment and, as a consequence, it did not substantially contribute to carceral expansion. Moreover, as

mentioned above, if evidence of a serious criminal offence was found, commissioners were bound to transfer competence to a public prosecutor's office, where, as feminist activists knew, an even longer process awaited. This frequently discouraged women from continuing the lawsuit. Paradoxically then, entering the penal system, as will be further shown below, appears to diminish the possibilities that a VAW process be finished, which in turn results in less probabilities of punishment.

The staff at the commissariats had thus learnt that women were not generally willing to complete a formal penal process, that they above all sought the interruption of violence, and that an even longer procedure at the criminal court would not be an answer in these cases. Nevertheless, during the

interviews I carried out with members of staff who worked at the commissariats and at women's NGOs, I noted a recurrent contradiction: interviewees tended to affirm that criminalising VAW was necessary but, as they were aware that the criminal process was cumbersome, costly and discouraging, they often insisted on the need for a *specialised* criminal procedure, stressing that it needed to be expeditious and simple. In addition to this, the prevalence of VAW, despite the existence of the law, was often posited as a matter of insufficient sanctions that did not serve the purpose of deterring offenders. One staff-member of a counterpart NGO observed that the provisions allowed to send men to prison 'for only 7 days', implying that VAW should not 'just' be a misdemeanour but a criminal offence. Women's organisations started discussing the need to reform Act 103 and it was generally agreed that the goal should be to obtain the criminalisation of VAW, but also an expeditious procedure to judge the offences.

#### 4 Violence against women in the new Ecuadorian penal code

Act 103 was in force until 2014, when a new penal code replaced most of its provisions.<sup>4</sup> The new code was enacted as a result of the 2008 constituent process, which was promoted by the new left-leaning regime and resulted in the enactment of a rights-based Constitution that in many ways broke the paradigm that had been established by the previous one, considered emblematic of the neoliberal period. Women's organisations prepared a draft preceding the Constituent Assembly which, drawing from transnational campaigns and the prior experience acquired during the assembly of 1998, elaborated a set of proposals promoting women's rights, including the right to a life free from violence. Most of these proposals were incorporated to the Constitution, which stated that the processes to judge crimes related to violence against women and other vulnerable groups should consist of specialised and expeditious procedures (Article 81). Additionally, it established a series of penal principles (*garantías* or guarantees) designed to limit the punitive power of the state and to ensure the materialisation of the rights of offenders and victims (Articles 76 and 77, Constitución de la República del Ecuador 2008). A climate of optimism seemed to prevail.

According to a 2012 National Survey, 6 out of 10 women in Ecuador have experienced some form of gender violence in their lives (Instituto Nacional de Estadísticas y Censos 2012). This high incidence has been recognised as a social problem: the 2006 Health Act declares that violence against women is a 'public health issue'; in 2007 the National Plan for the Eradication of Gender Violence Against Women, Young Girls, Boys and Adolescents was

“The case of psychological violence is probably the one that most clearly reveals the expulsion of women's experience from legislative deliberations and resulting legislation.”

launched; in 2013 specialised courts were created to deal with misdemeanours in matters of domestic violence. Finally, the existing penal code, which had largely preserved the contents and structure of a 1938 codification, was deemed chaotic and anachronistic, which supported the decision to create a comprehensive code that would be in harmony with the Constitution. Women's organisations took the opportunity to campaign for the criminalisation of femicide, a phenomenon whose discussion was largely led by Latin American feminists (e.g. Lagarde 2010). Intimate-partner abuse was brought up again in the hopes that a new law, framed within the constitutional guidelines, could improve the efficacy of VAW regulation.

Although in the 1990s the key interlocutors during the run-up to the enactment of VAW legislation were women's organisations and congressmen, the political scenario had changed by 2012, when the new code started to be discussed. Self-identified feminists were now assembly members of the legislature, and they became the key interlocutors of civil society organisations. Also, this time around there was no general consensus among activists, professionals and politicians. The criminalisation strategy was seen with suspicion by those who had experience working with survivors of domestic violence, particularly after the first drafts of the code were disseminated, showing that the criminalisation of VAW, as I explain below, would entail the loss of the specialised procedure that Act 103 had established for psychological violence, as well as the rapid protection measures that used to be issued on the basis of women's testimonies. These drafts were not elaborated by civil society organisations as in the 1990s; they emerged from within the National Assembly itself and did not always incorporate the suggestions that were submitted by activists and women's collectives.

Overall, and contrary to many expectations, the penal code implemented a series of reforms that can be considered symptomatic of penal expansionism. It aggravated the sanctions for many existing crimes and introduced around 70 new criminal offences (El Universo 2014), showing that the punitive trend embodied in the code surpassed the scope of gender and VAW, although sexual and gender-based violence was indeed addressed. An offence referred to as 'violence against women and the nuclear family' was introduced; through this category, the forms of domestic violence that the older law had treated as misdemeanours, including psychological violence, became criminal offences. This means that they are to be judged by ordinary criminal courts, through the general penal procedure established for common crimes. Only minor physical injuries (those that prevent a person from working for less than three days), remained framed as misdemeanours and

were assigned the simpler procedure that the code prescribes for minor offences. These are also managed by specialised courts.<sup>5</sup>

In addition to this, and for the second time, VAW was conflated with family violence. What is more, one of the first drafts described domestic abuse as family violence only, failing to mention women explicitly. In a kind of reverse process compared to the 1990s one, women were introduced in the text afterwards, at the insistence of women's organisations. More problematically, despite the constitutional principle that establishes a rapid procedure for violence against women,<sup>6</sup> the code submitted family violence offences to the ordinary penal process, which has resulted not only in a course of action that is more complex and time-consuming for women,<sup>7</sup> but also in increased difficulties for them to obtain protection measures. Within the penal logic, a pre-emptive judicial order needs to be justified; it has to be requested from the judge by a public prosecutor and granted if the judge finds sufficient merits to issue it. As a consequence, reports have already started to show a decline in the denunciation of psychological violence – the most prevalent form of gender violence according to available statistics – presumably due to these difficulties (El Diario 2014). As was the case when Act 103 was in force, criminalisation appears to diminish the possibilities of applying sanctions, but also, under the current legislation, it is more difficult to provide women with the legal measures they request.

The case of psychological violence is probably the one that most clearly reveals the expulsion of women's experience from legislative deliberations and resulting legislation. While its treatment as misdemeanour in Act 103 had ensured that women be able to report forms of abuse that seldom leave tangible traces but that cause distress and pose risk – such as hostility, verbal abuse, yelling and threats – criminalisation means that a precise assessment of the damages caused by the abuse is needed in order to determine a proportional sanction. The code thus establishes a scale to measure psychological damage in the same fashion that physical injuries are assessed; that is, severity is determined according to the number of days a person is unable to work as the result of an aggression. This scale, as some experts in psychology have told me, is very difficult, if not impossible to apply, as it is not easy to unequivocally demonstrate that emotional damage – which, I was told, needs to be very serious in order to prevent a person from working – is directly connected to a particular event of abuse.

The above examples show that the woman constructed by the new domestic violence legislation is one that has time, resources and a role in the family and there are a series of problematic consequences when criminal law is used to manage the situation of marginalised, vulnerable people.



## 5 Conclusions

By analysing the implementation of VAW legislation in Ecuador, within the Latin American context, this piece has suggested that the expansion of penalty is a phenomenon that surpasses the boundaries of political and constitutional change. This expansion has impacted feminist action in problematic ways: the availability of criminal law as the universal means to express social rejection of a conduct, as well as its relation to rights-based discourses, has facilitated the centring of penal reform as a strategy aimed at counteracting VAW. While, as foregrounded above, no such thing as a 'carceral' feminist project appears to exist at the level of Ecuadorian legal practice, penalty does pose a number of problems for feminist politics as it diverts the attention of activists to mechanisms that do not necessarily tackle the roots of gender inequality. Furthermore, criminalisation processes can produce unintended consequences when a phenomenon that has its origins in political subordination is regulated through a set of pre-established principles that are designed to address common crimes. The various difficulties that the new penal regulation of VAW in Ecuador is bringing to women teach us a lesson regarding the exclusion of their experience – of activists and collectives as well as users of the justice system – from the processes through which the law is defined and implemented. While legal texts may appear to respond to the concerns of women, they often reframe their demands, adapting them to dominant knowledges, procedures, principles and values. Feminist penal reform in Latin America may not be a factor that is directly provoking the expansion of carcerality, but a feminist discussion of the implications of liberal criminal law as a framework to understand gender-based violence, of criminalisation as a political strategy and of the penal process as a form of intervention in women's lives, needs to be deepened.

### Endnotes

<sup>1</sup> The governments of Argentina, Bolivia, Brazil, Ecuador, Nicaragua, Venezuela and Uruguay have been called 'pink tide' or 'post-neoliberal' governments (Borón 2003). Their ideological framework has been referred to as 'socialism of the 21st century' (Dieterich 2009).

<sup>2</sup> For instance, Argentina 1994; Bolivia 1995; Chile 1995; Colombia 1996; Ecuador 1995; Perú 1993; Venezuela 1998 (Almérás *et al.* 2004).

<sup>3</sup> In the Ecuadorian penal system, infractions are classified as either criminal offences or misdemeanours (*delitos o contravenciones*), according to their severity. In this way, physical injuries can qualify as either one, the objective criteria being that if an injury causes inability to work for up to three days, it is considered a misdemeanour (*contravención*), and when the inability exceeds that time, it is considered a criminal offence (*delito*).

<sup>4</sup> The only parts of the Act that have not been repealed are the preamble and the definitions of violence against women.

<sup>5</sup> When Act 103 was in force, the misdemeanours that fell under its provisions were judged at specialised commissariats for women and the family, which had been assigned for the purpose before the law was enacted. Afterwards, in 2013, specialised courts were created in order to judge gender-based violence. However, since the new code criminalised most forms of VAW in 2013, these specialised courts are presently only competent to judge physical injury misdemeanours.

<sup>6</sup> In 2014 a group of women's organisations filed an unconstitutionality lawsuit of the penal code articles that categorise the VAW offences submitting them to the general penal procedure. This was yet to be resolved by the Constitutional Court by the time this piece was written.

<sup>7</sup> The ordinary penal process comprises four stages that can have different durations. The pre-process stage alone, called 'previous investigation', can last up to one year for offences penalised with up to five years of imprisonment, and up to two years for offences penalised with more than five years.

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# Engendering Reproductive Rights in the Inter-American System

CIARA O'CONNELL\*

## 1 Introduction

The challenge of including a gender perspective within human rights work has been a project only recently undertaken by the international human rights community (United Nations 1981, 1994, 1995).

It is undeniable that much progress has been made over the past two decades in regard to advocacy and legal efforts to protect, promote and fulfil women's human rights. However, there remain significant shortcomings in how the law is used to address systemic conditions that cause the subordination of women. This article seeks to explore the gap that exists between women's rights rhetoric and implementation at the national level. An examination of women's reproductive rights in the Inter-American System of Human Rights serves as a lens by which to explore how international human rights bodies fall short in addressing the gendered implications of women's rights violations as they are embedded in national cultures.

This article reflects on fieldwork conducted in the summer of 2014 to introduce key challenges the Inter-American System of Human Rights faces in incorporating a gender-based approach to women's reproductive rights violations. First, an introduction to the Inter-American System sets the stage for an examination of the role of gender in human rights law. Second, a brief overview of the women's reproductive rights protections within human rights

law elucidates the context in which reproductive rights exist. Next, this article introduces fieldwork methodology and initial findings in order to share ideas about how actors involved in and around reproductive rights cases engage with the concept of gender. Finally, an examination of the *Artavia Murillo et al. ('In vitro fertilization') v Costa Rica*<sup>1</sup> case from 2012 highlights advancements and missed opportunities in how the Inter-American Court applies gender to a reproductive rights case.

## 2 The Inter-American system of human rights

The Inter-American System of Human Rights exists as an organ of the Organization of American States, which is an intercontinental organisation designed to promote regional solidarity and cooperation among its member states. It entrusts two treaty-monitoring bodies, the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights, with interpreting and applying the American Convention on Human Rights (OAS 1969); a Convention focused on the protection of civil and political rights. The purpose of the Commission and Court is to serve as the legal last resort for victims seeking redress for violations of their human rights. This means that the victim has exhausted all national legal resources, or that national courts have been deemed incapable of holding fair and just legal proceedings. Even in situations where the state was not the immediate perpetrator of rights violations, it can be held accountable for creating an environment in which the violation occurred, or for failing to provide a remedy to the victim.<sup>2</sup> Additionally, the Commission and Court's duties include monitoring human rights situations in countries within the Americas, delivering recommendations and judgments in human rights cases, and issuing provisional and precautionary measures to states.<sup>3</sup> While the American Convention on Human Rights is the principal human rights treaty in the region, the Inter-American System operates numerous other treaties, such as the Additional Protocol on Economic, Social and Cultural Rights (Protocol of San Salvador) (OAS 1988), the Inter-American Convention to Prevent and Punish Torture (OAS 1985), and the Convention on the Prevention, Punishment and Eradication of Violence Against Women (Convention of Belém do Pará) (OAS 1994), which is the most ratified instrument in the Inter-American System and is currently the only international treaty designed to specifically address violence against women.<sup>4</sup>

The Inter-American System is undoubtedly a forum for the advancement of women's rights, a claim which is supported by recent cases on violence against women, such as *Miguel Castro Castro Prison v Peru*,<sup>5</sup> and *González et al. ('Cotton Field') v Mexico*.<sup>6</sup> Each of these cases addressed the sociocultural context in which women's rights violations occur; a context that is violent,

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patriarchal and discriminatory. For example, in the Cotton Field case, the Inter-American Court accepted the petitioner's claim that gender-based murder is the equivalent of femicide (*feminicidio*) (Lagarde 2010).<sup>7</sup> The Court's exploration of the role of gender in the murder of three women in this case was groundbreaking, especially as the Court required the State of Mexico to implement numerous reparations (measures designed to repair and/or prevent harm), which included gender-training programmes for public officials.<sup>8</sup> While it can be argued that the Inter-American System has been increasingly active in examining both the causes and implications of gender-based violence, especially in its reporting mechanisms, there is an undeniable gap in its application with regards to women's reproductive rights violations within the nation state.

### 3 Reproductive rights in international human rights law

Women's reproductive rights can be located within international conventions, case law, reports and national legislation. Perhaps the most widely accepted definition of reproductive rights comes from the International Conference on Population

and Development Programme of Action. It defined reproductive health care as follows:

Reproductive health is a state of complete physical, mental and social well-being, and not merely the absence of disease or infirmity – in all matters relating to the reproductive system and to its functions and processes. Consequently, reproductive health implies that people are able to have a satisfying and safe sex life, that they are able to reproduce and that they have the freedom to decide if, when and how often to do so. Implicit in this is the right of men and women to be informed and to have access to safe, effective, affordable and acceptable methods of family planning of their choice, as well as other methods of their choice for regulation of fertility, which are not against the law, and the right of access to health-care services that will enable women to go safely through pregnancy and childbirth (United Nations 1994, Rev. 1 1995 para 72).

It also included 'the right of all to make decisions concerning reproduction free of discrimination, coercion and violence as expressed in human rights

▼ A man entering the courtrooms of the Special Tribunals of Violence Against Women in the buildings of the Supreme Court in Venezuela.





documents' (*Ibid.*, para 73). By referencing 'human rights documents,' the Programme of Action clearly inferred that reproductive rights were already part of the norms and principles enshrined within human rights law. For example, a woman's right to be free from discrimination already exists within the Universal Declaration of Human Rights (UN 1948, Article 7), the International Covenant on Civil and Political Rights (UN 1966a, Article 26), and the International Covenant on Economic, Social and Cultural Rights (UN 1966b, Article 2).

Women's reproductive rights have been interpreted in case law and national legislation as they are indivisible from various human rights such as, *inter alia*, the right to privacy, the rights to life and health, the right to equality and freedom from discrimination, the rights to liberty and dignity, and the right to family life. Often, women's reproductive rights are framed as civil and political rights in order to satisfy international human rights norms that deem civil and political rights more enforceable than economic, social and cultural rights. For example, the right to abortion is enshrined within the right to private life in the United States, as concluded in *Roe v Wade*.<sup>9</sup> In contrast, Colombia's Constitutional Court protects the right to abortion (only in limited circumstances) within the rights to life, dignity and health.<sup>10</sup>

While women's reproductive rights are intrinsically linked to rights to equality and freedom from discrimination, litigation strategies do not adequately focus on these rights. As Ronli Sifris (2010: 189) warned, a failure to use a multifaceted approach to understanding and claiming violations of women's reproductive rights runs a significant risk of oversimplifying the ways in which women experience denial of their rights. Women experience violations of their rights due to structures such as sociocultural values and practices that place a woman's role as a mother before her autonomous individuality; stereotypes, policies and practices that give control and decision-making power to men; and subordination of women in both the public and private spheres (O'Connell 2014, note 32). According to Ruth Rubio-Marin (2009: 91), these structures have a 'compound effect... [where] violence, discrimination, and exploitation that women and girls are subject to... becomes most vivid when we examine the gendered nature of the harms that women endure and the short and long-term effects on their lives.'

In the recent *Artavia Murillo et al. v Costa Rica* case (also referred to as the 'Artavia Murillo' case), the Inter-American Court expanded on the definition of reproductive health by drawing an indivisible link between reproductive health and the right to private life, including the right to liberty.<sup>11</sup> In its reasoning, the Court asserted,

(T)he right to private life is related to: (i) reproductive autonomy, and (ii) access to reproductive health services, which includes the right to have access to the medical technology necessary to exercise this right.... This right is violated when the means by which a woman can exercise the right to control her fertility are restricted. Thus, the protection of private life includes respect for the decisions both to become a mother or a father, and a couple's decision to become genetic parents.<sup>12</sup>

The definition of reproductive health adopted by the Inter-American Court in this case is expansive and bold in its effort to connect reproductive rights to the right to private life. In the above definition, the Court acknowledges the State's obligation to not only refrain from interfering in women's lives and decision-making, but to also 'provide public provisions in order to exercise the right to private (reproductive) life, which requires the distribution of provisions in the form of medical technology' (O'Connell forthcoming). While the rhetoric designed around women's reproductive rights is impressive in this case, and in international human rights law reporting in general, in practice it holds little weight. An examination of women's reproductive rights cases in the Inter-American System reveals that reproductive rights discourse developed in international human rights treaties, cases and reports falls short when applied to women's reproductive rights cases, especially concerning the design and implementation of reparations.<sup>13</sup>

## 4 Fieldwork

In order to explore the gap that exists between women's reproductive rights rhetoric and implementation within the Inter-American System, interviews were conducted with individuals working in and around reproductive rights in Peru, Mexico and Costa Rica. Additionally, interviews were conducted with representatives from the Inter-American Commission and Court. These countries were selected because each had a reproductive rights case processed through the Inter-American System: *María Mamerita Mestanza Chávez v Peru*<sup>14</sup> (forced sterilisation); *Paulina del Carmen Ramírez Jacinto v Mexico*<sup>15</sup> (adolescent abortion), and *Artavia Murillo et al. ('In vitro fertilization') v Costa Rica*.<sup>16</sup> Over 40 individuals participated in semi-structured interviews, where the people selected were representative of women's rights and human rights non-governmental organisations (NGOs), the medical community and state departments. The objective of conducting interviews with this group of individuals was to: (1) determine the causes and consequences of the gap that exists between international/regional human rights law and its implementation at the national level, specifically focusing on women's reproductive rights; (2) develop an understanding of the challenges various actors face in developing, implementing and monitoring women's reproductive

rights; and (3) recommend strategies to strengthen the Inter-American System's work in protecting, promoting and fulfilling women's reproductive rights. Although the cases explored during fieldwork had already been processed and for the most part completed, the intention of the research was to learn from these cases in order to understand how to better strategise and develop reasoning, especially in regards to the design of reparations, in future women's reproductive rights cases.<sup>17</sup> Following the interview stages of this research, a report was drafted and distributed to the participants in an attempt both to express appreciation for their participation and to challenge the practitioner/academic divide (see O'Connell 2015).

Interviews with representatives from women's rights NGOs that represent victims before the Inter-American System revealed that actors are reluctant to include an examination of the role of gender in women's reproductive rights violations. Instead, litigators and advocates frame reproductive rights violations within their context as violations of the right to life, health and/or privacy, with the assumption that gender underpins these violations. Adriana Maroto, an academic and activist with La Colectiva in Costa Rica explained,

(T)he discourse of gender in the legal arena is very fragile... so, when we try to construct the concept of health, or of *vida digna* [dignified life], we're doing it from the point of view of gender. We have to do it from the other side... there is a gender discourse that supports these arguments, but they have their foundation in the health aspects.<sup>18</sup>

By neglecting to include the role of gender within the foundation of women's reproductive rights violations, petitioners effectively limit the potential to build a case that focuses on violations of rights to equality and non-discrimination. This fractured approach to building a case results in reparations that fail to effectively address the pre-existing conditions which originally contributed to/caused women's reproductive rights violations.

The following section explores *Artavia Murillo et al. v Costa Rica* in order to introduce some of the conclusions identified during fieldwork around the application of gender in women's reproductive rights cases. The Inter-American Court of Human Rights issued the final judgment in this case in November 2012, when it was then hailed as a significant advancement for women's rights. While the case is undoubtedly monumental in terms of its reasoning and potential for application in future reproductive rights cases, it falls short in its attempt to relate the gendered implications of women's reproductive rights violations to the process of reparation or the transformation of the national legal culture.

## 5 *Artavia Murillo et al. ('In vitro fertilization') v Costa Rica*

*Artavia Murillo et al. v Costa Rica* was a reproductive rights case concerned with access to in vitro fertilisation (IVF). Costa Rica banned IVF in the year 2000,<sup>19</sup> and did so on the grounds that an executive decree authorising IVF in 1995 was unconstitutional as it violated the right to life of the unborn, as protected by Article 4(1) of the American Convention on Human Rights.<sup>20</sup> The Inter-American Commission on Human Rights submitted the case to the Court, where it emphasised that such a restriction on IVF procedures had a disproportionate impact on women.<sup>21</sup> The victim's representatives (petitioners or common interveners) in this case framed infertility as reproductive disability, where the main argument was not designed to examine the prohibition on IVF as a women's rights issue. Only in the final stages of the case were members of civil society invited to join in a consultancy capacity to include reasoning and argumentation on the role of gender-based discrimination and its implications for women.<sup>22</sup> When the case was sent to the

Court, ten years after it was originally sent to the Commission, the petitioners and the Commission did not include violations of the Convention of Belém do Pará, nor did they address the State's concern with the right to life violation. Rather, the case raised by the Commission and the petitioners was based on the rights to private and family life; women's reproductive rights were not part of the initial case foundation.<sup>23</sup> During the case proceedings before the Inter-American Court, the Court determined that the ban on IVF actually *stops* potential for human life, and that the IVF procedure did not constitute a violation of the right to life of the unborn. A number of the judges took issue with the Costa Rican State's argument that the IVF procedure results in loss of life. For example, Judge Margarette May Macaulay exclaimed during proceedings,

(The Costa Rican) Constitutional Chamber said that the human embryo is a person from the moment of conception... So, that Chamber has stated that as a conclusive premise, without a doubt as far as Costa Rica is concerned, yes? If that is so, it would logically follow, as embryos are lost naturally, that Costa Rica will then ban sex.<sup>24</sup>

While the judgment certainly reflected concerns with Costa Rica's reasons for banning IVF, it also went to great lengths to explain the scientific definitions of words such as 'conception,' and 'fertilisation';

“...actors are reluctant to include an examination of the role of gender in women's reproductive rights violations...”

concepts that are of particular importance for future reproductive rights cases.<sup>25</sup> Additionally, the Court judgment incorporated an analysis of the role of gender in reproductive rights, with particular emphasis on gender roles and stereotypes. The following sections examine how gender was, or was not, incorporated within the judgment, and concludes that the petitioner's failure to adequately reflect on the role of gender in reproductive rights violations severely limits the transformative potential of the *Artavia Murillo et al. v Costa Rica* case.

### 5.1 Gender in the judgment

The Inter-American Court spent a significant amount of time examining the role of gender in violations of women's reproductive rights. The Court's reasoning included expert witness testimony which provided support for the claim that the ban on IVF disproportionately affects women. Alicia Neuburger explained that

“The reparations issued in this case did not reflect upon the role of gender in reproductive rights violations... in many ways they were reparations designed to benefit a particular *type* of woman, not *all* women, and a particular *type* of couple, not *all* couples.”

(T)he gender identity model is socially defined and molded by the culture; its subsequent naturalization responds to socioeconomic, political, cultural and historic determinants. According to these determinants, women are raised and socialized to be wives and mothers, to take care of and attend to the intimate world of affections. The ideal for women, even nowadays, is embodied in sacrifice and dedication, and the culmination of these values is represented by motherhood and the ability to give birth.... The impact of infertility in women is usually greater than in men because ... motherhood has been assigned to women as an essential part of their gender identity, transformed into their destiny.<sup>26</sup>

Expert Witness Paul Hunt, former UN Special Rapporteur on the Right to Health, explained, in regards to the situation of infertile women, that ‘in many societies infertility is attributed mainly and disproportionately to women owing to the persisting gender stereotype that defines a woman as the basic creator of the family’.<sup>27</sup> Additionally,

Neuburger discussed the gender implications of the IVF ban for infertile men: ‘(F)ertile disability causes men to feel a strong sense of impotence and, consequently, a questioning of their gender identity. Concealing their fertile dysfunction socially is the usual defensive strategy because they fear

being laughed at or questioned by other men’.<sup>28</sup> The Court reflected on testimony provided by expert witnesses, as well as on materials from the United Nations Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) committee and the World Health Organization, to conclude that ‘gender stereotypes are incompatible with international human rights law and measures must be taken to eliminate them’.<sup>29</sup> The Court explained that it was ‘not validating these stereotypes and only recognize(d) them and define(d) them in order to describe the disproportionate impact of the interference caused by the Constitutional Chamber’s judgment’.<sup>30</sup>

The Court’s inclusion of a discussion of the role of gender in reproductive health was a significant advancement, especially because the petitioner and the Commission did not adequately focus on the gendered implications of the IVF ban.<sup>31</sup> However, the Court did not elect to exercise its *motu proprio* capacity to expand upon and design reparations (see Rubio-Marín and Sandoval 2011: 1091) and instead drew upon the reparations requested by the petitioner in its final judgment.<sup>32</sup> The Court made great strides in its gender-based approach to understanding IVF as a reproductive right violation, but unfortunately the reparations delineated in the judgment in no way reflected these advancements.

### 5.2 Gender in reparations?

In its conclusion, the Court’s judgment contained a list of reparations, which are provisions with which the State must comply in order to repair and prevent future harm experienced by victims of human rights abuses. In summary the reparations issued in the *Artavia Murillo* case were: (1) psychological treatment for those victims in the case that request it; (2) publication of the judgment; (3) annulment of the prohibition on IVF treatments and access to the service at health-care facilities with infertility treatment centres; (4) education and training programmes in human and reproductive rights for all members of the judiciary (making mention of the judgment); and (5) monetary compensation for the victims.<sup>33</sup> These reparations were selected by the Court from a list of reparations originally drafted and submitted by the petitioners and the Commission.<sup>34</sup> Because the primary concern of the petitioner was to repeal the IVF ban and receive monetary compensation for the victims in this case, the reparations did not reflect the discrimination and violence women experience in attempting to access their reproductive rights. Alejandra Cárdenas explained that the weak reparations in this case are indicative of the fact that ‘there is no tradition to be thinking about reparations in the Commission’.<sup>35</sup>

The reparations issued in this case did not reflect upon the role of gender in reproductive rights violations.

They did not require the state to address gender-based discrimination and/or gender stereotyping, and in many ways they were reparations designed to benefit a particular *type* of woman, not *all* women, and a particular *type* of couple, not *all* couples. The pre-existing conditions that prohibit women from accessing IVF in Costa Rica are reminiscent of patriarchal norms prevalent across the Inter-American region, which also restrict women's access to emergency contraception as well as safe legal abortions. The reparations in this case failed to address the larger issue: the ban on IVF is one of many tools designed to subordinate and control women and their reproductive choice.

### 5.3 Missed opportunities

The foremost missed opportunity in the *Artavia Murillo et al. v Costa Rica* case was the failure on behalf of the petitioners, the Commission and the Court to use the case as an opportunity to demand state action to address the root causes of women's denial of their reproductive rights. Interviews with actors involved in this case revealed that this case had the potential to go much further, but was limited by the actors themselves. Adriana Maroto explained,

They (the lawyers) had a huge opportunity to talk about human rights and reproductive rights, but the lawyers talked about right to life from conception, but just to defend the in vitro case. Feminist organizations, like La Colectiva, offered help, but they didn't accept it, because they were worried about their professional image, let's say.<sup>36</sup>

The *Artavia Murillo* case was not originally intended to challenge the power and control paradigm that dictates how women enjoy their reproductive rights. Despite the relative success of this case, the petitioners are largely at fault for the limited scope of this case. Huberth May, one of the lawyers who represented a group of victims in the *Artavia Murillo* case, reflected on the impact of the case and said,

I think that if we had to begin again we would include the reproductive rights and use the trial as an opportunity to help Costa Rican society progress... I believe the trial was not planned to go in that direction... issues like abortion, contraception, and topics related to women's autonomy and right to decide about procreation, sex, etc.... I believe we could have taken more advantage of this case.<sup>37</sup>

From the initial stages of this case, the petitioners (and victims themselves) were primarily concerned with repealing the state ban on IVF, and receiving reparations in the form of monetary compensation.<sup>38</sup> The lawyers received offers of advice from civil society organisations with expertise in women's reproductive rights and international litigation, but

as Huberth May explained, 'we were worried about overcomplicating things... it was fairly authoritarian'.<sup>39</sup> The obvious disconnect between gender reasoning and the reparations designed in this case elucidate prospective areas for advancement in future women's rights cases.

## 6 Conclusion: What's next?

Drawing on lessons learned from the *Artavia Murillo et al. v Costa Rica* case, this article suggests several recommendations to more effectively incorporate gender in the work of women's reproductive rights within the Inter-American System of Human Rights. First, interview participants representing the Commission expressed a need to 'institutionalise gender' within the Commission's work.<sup>40</sup> They suggested that gender-sensitivity training should be implemented for all employees within the Commission, as well as for litigators engaged with cases before the Inter-American System. Additionally, gender-based education should be included in reparation measures. For example, reparations could require the state to implement gender-based education at all levels of public schooling. Second, in order to maximise the transformative potential of women's reproductive rights case, it is necessary to develop reasoning and reparations that acknowledge and aim to empower the most disadvantaged and marginalised women. An intersectional approach to understanding the violence and discrimination women face is essential in the design of effective reparations that have the intention of tackling pre-existing sociocultural conditions that harm women. Third, actors need to utilise and expand upon the tools available to them within international human rights law. The *Artavia Murillo* case did not include provisions of the Convention of Belém do Pará, a convention specifically created to address women's rights violations. By failing to utilise the tools available to them, actors miss out on opportunities to expand upon the capacity and credibility of those tools. Finally, it is important to understand women's reproductive health rights as intersecting, indivisible and multifaceted rights. By failing to examine violations of rights to equality and non-discrimination, and simply focusing on rights to privacy, health or family life, it becomes possible to oversimplify how women experience violations of their reproductive rights (Sifris 2010: 22). The *Artavia Murillo et al. v Costa Rica* case is the perfect example of this situation, where a singular approach to case design resulted in reparations that did not examine or reflect upon the role of gender in women's reproductive rights.

### Endnotes

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<sup>1</sup> *Artavia Murillo et al. ('In vitro fertilization') v Costa Rica*, Merits, Reparations, and Costs, Int. Am. Ct. H.R., 28 November 2012.

<sup>2</sup> *Velasquez Rodriguez v Honduras*, Merits, Judgment, Inter-Am. Ct. H.R., 29 July 1988, para. 172.

<sup>3</sup> For an introduction to the Inter-American System and especially the Inter-American Court, see Pasqualucci 2013.

<sup>4</sup> *The Convention on Preventing and Combating Violence against Women and Domestic Violence* ('Istanbul Convention') was drafted in 2011, and entered into force in 2014.

<sup>5</sup> *Miguel Castro Castro Prison v Peru*, Merits, Reparations, and Costs, Int. Am. Ct. H.R. 2 August 2008.

<sup>6</sup> *González et al. ('Cotton Field') v Mexico*, Merits, Reparations, and Costs, Int. Am. Ct. H.R. 16 November 2009.

<sup>7</sup> According to Lagarde, *feminicidio* is a form of genocide that 'occurs when historical conditions generate social practices that allow for violent attempts against the integrity, health, liberties and lives of girls and women'.

<sup>8</sup> *González et al. ('Cotton Field') v Mexico*, Merits, Reparations, and Costs, Int. Am. Ct. H.R. 16 November 2009, sec. 4.2.8. See also Supreme Court of Mexico (2013) *Judicial Decision-Making with a Gender Perspective: A Protocol - Making Equal Rights Real*, which was created in response to a number of women's rights cases before the Court.

<sup>9</sup> *Roe v Wade*, 410 U.S. 113 (1973).

<sup>10</sup> Constitutional Court of Costa Rica, Judgment C-355/06, 10 May 2006, Sec. 10.1; and Judgment T-760/08 July 31, 2008, available at [www.escri-net.org/sites/default/files/English\\_summary\\_T-760.pdf](http://www.escri-net.org/sites/default/files/English_summary_T-760.pdf) (accessed 15 June 2015).

<sup>11</sup> *Artavia Murillo et al. ('In vitro fertilization') v Costa Rica*, supra at 2, para. 142. For further discussion on the right to private life in the *Artavia Murillo* case, see O'Connell (forthcoming).

<sup>12</sup> *Artavia Murillo et al. ('In vitro fertilization') v Costa Rica*, supra at 2, para. 146.

<sup>13</sup> A basic principle of international law states that 'every violation of an international obligation which results in harm creates a duty to make adequate reparation.' (*Velasquez Rodriguez v Honduras*, Reparations and Costs, Inter-Am. Ct. H.R. 21 July 1989, para. 25, citing *Factory at Chorzów*, Merits, 1928 PCIJ (Ser. A) No. 17, at 29). Reparations are '(M)asures aimed at removing the effects of the violation. Their nature and amount are dependent upon the specifics of the violation and the damage inflicted at both the pecuniary and non pecuniary levels.' (*Goiburú et al. v Paraguay*, Merits, Reparations and Costs, Inter-Am. Ct. H.R., 22 September 2006, para. 143.)

<sup>14</sup> *María Mamerita Mestanza Chávez v Peru*, Inter-Am. Comm. H.R., Case 12.191, Friendly Settlement, Report 71/03, 2003.

<sup>15</sup> *Paulina del Carmen Ramírez Jacinto v Mexico*, Inter-Am. Comm. H.R., Friendly Settlement Agreement, Report No. 21/07, 161-02, 9 March 2007.

<sup>16</sup> *Artavia Murillo et al. ('In vitro fertilization') v Costa Rica*, supra at 2.

<sup>17</sup> Admitted Cases: *IV v Bolivia* (forced sterilisation) was admitted by the Inter-American Commission in 2008,

and a Merits Decision was reached in 2014 (*IV v Bolivia*, Report No. 72/14, Case. 12.655, Merits, 15 August 2014). The Commission sent the case to the Inter-American Court in April 2015 (Case 12.655, Letter of Submission to the Inter-American Court, 26 April 2015); *F.S. v Chile* (forced sterilisation) was admitted by the Commission in 2014 (*F.S. v Chile*, Admissibility Report, Report No. 52/14, Petition 112-09, OEA/Ser.L/V/II.151 Doc. 17, 21 July 2014). The following cases, all of which are concerned with the right to abortion, are pending admission before the Inter-American Commission on Human Rights: *AN v Costa Rica* (2008); *Manuela v El Salvador* (2012); *Aurora v Costa Rica* (2013); and *B v El Salvador* (2013).

<sup>18</sup> Interview with Adriana Maroto, academic and activist with The Collective for the Right to Decide (La Colectiva), University of Costa Rica, San Jose, Costa Rica, 14 August 2014.

<sup>19</sup> *Artavia Murillo et al. ('In vitro fertilization') v Costa Rica*, supra at 2, para. 2.

<sup>20</sup> *Ibid.*, paras. 68, 71, note 82.

<sup>21</sup> *Ibid.*, para. 2.

<sup>22</sup> Interview with Alejandra Cardenas, Attorney, Inter-American Commission on Human Rights, Washington DC, USA, 27 August 2014. See *Gretel Artavia Murillo et al. ('In Vitro Fertilization') v Costa Rica*, Merits Report, No. 85/10, Case 12.361, 14 July 2010.

<sup>23</sup> Interview with Alejandra Cardenas, Attorney, Inter-American Commission on Human Rights, Washington, DC, USA, 27 August 2014. See *Gretel Artavia Murillo et al. ('In Vitro Fertilization') v Costa Rica*, Merits Report, No. 85/10, Case 12.361, 14 July 2010.

<sup>24</sup> Public Hearings of the 96th Regular Session from Aug. 27-Sept. 7, 2012. Inter-Am. Ct. H.R., *Case of Artavia Murillo et al. (IVF) v Costa Rica*, 2:38:00, [http://icmr.org/noticias\\_048\\_audiencia-fiv-costa-rica-09-2012.htm](http://icmr.org/noticias_048_audiencia-fiv-costa-rica-09-2012.htm) (accessed 11 July 2015).

<sup>25</sup> *Artavia Murillo et al. ('In vitro fertilization') v Costa Rica*, supra at 2, paras. 174–190.

<sup>26</sup> *Ibid.*, para. 298.

<sup>27</sup> *Ibid.*, para. 295.

<sup>28</sup> *Ibid.*, para. 301.

<sup>29</sup> *Ibid.*, para. 302.

<sup>30</sup> *Ibid.*

<sup>31</sup> *Gretel Artavia Murillo et al. (In vitro fertilization) v Costa Rica*, Inter-Am. Comm. H.R. Report No. 85/10, Case 12.361, 14 July 2010, para. 131. In its Merits Decision the Commission stated, '(T)he Commission observes that the technique of in vitro fertilization is a procedure that more directly concerns the woman's treatment and body, and hence women bear the brunt of the impact of the Constitutional Chamber's decision. ... The procedure is largely centered on what a woman wants and decides to do with her own body. ... In effect, while infertility is a condition that can effect both men and women, the use of assisted reproductive technologies places greater demands on the woman's body. Therefore, the prohibition of *in vitro* fertilization has a direct effect on women's free will with regard to their bodies.'

<sup>32</sup> Interview with Alexandra Sandoval, Senior Attorney, Inter-American Court of Human Rights, San Jose, Costa Rica, 12 August 2014. 'In reparations, most of the time (the Court) says that they don't order reparations that the (petitioner/Commission) didn't ask for... It (would be) really strange for the Court to order a reparation that no one asks for'.

<sup>33</sup> *Artavia Murillo et al. ('In vitro fertilization') v Costa Rica*, Merits, supra at 2, page 106–7 (IX Operative Paragraphs).

<sup>34</sup> All reparations were complied with by the State except repeal of the IVF ban (as of July 2015). Compliance information obtained from interviews with Dr Delia Ribas, Huberth May and Jorge Oviedo (Office of the General Prosecutor), San Jose, Costa Rica, August 2014.

<sup>35</sup> Interview with Alejandra Cardenas, Attorney, Inter-American Commission on Human Rights, Washington DC, USA, 27 August 2014.

<sup>36</sup> Interview with Adriana Maroto, academic and activist with The Collective for the Right to Decide (La Colectiva), University of Costa Rica, San Jose, Costa Rica, 14 August 2014.

<sup>37</sup> Interview with Huberth May, victim's representative, *Artavia Murillo et al. v Costa Rica*, San Jose, Costa Rica, Legislative Assembly, 18 August 2014.

<sup>38</sup> Interview with Dr Delia Ribas, IVF doctor, original claimant in *Artavia Murillo case*, San Jose, Costa Rica, 13 August 2014.

<sup>39</sup> Interview with Huberth May, victim's representative, *Artavia Murillo et al. v Costa Rica*, San Jose, Costa Rica, Legislative Assembly, 18 August 2014.

<sup>40</sup> Interviews with Rosa Celorio, Attorney, Women's Rights Desk at the Inter-American Commission on Human Rights, Washington DC, USA, 28 August 2014; and Alejandra Cardenas, Attorney, Inter-American Commission on Human Rights, Washington DC, USA, 27 August 2014.

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▲ Nisha Ayub in Kuala Lumpur in 2015, where she works as an advocate for the rights of other transgender women.

# Transgender Rights in Malaysia: Religion, Politics and Law

NISHA AYUB

In Malaysia, legal prohibitions on cross-dressing or gender non-conforming behaviour remain in force. Historically, however, transgender people enjoyed much wider acceptance in Malaysian and Malayan society. It is only more recently that the legal and political climate has become much less accepting. To understand why this is, we need to understand the way in which religion – in the form of Islamisation policies – has come to influence the law and politics and the effect that this has had on transgender populations.

## 1 History: *sida-sida* in Malaya

Historically, transgender people have had an accepted place in Malaysian society and culture. In pre-colonial Malaya transgender people were known as *sida-sida* and held positions at the court of the sultan. At weddings, they acted as *mak andam* – bridal make-up artists.

This meant that, until the 1980s, transgender people enjoyed considerable protection and acceptance in Malaysia. Social security funding was available for sex-reassignment surgery, and the operation was performed by local Muslim doctors. In the federal territories of Wilayah Persekutuan, social welfare funding was provided towards the running of a transgender association and transgender people were able to change their gender markers on their identity documents.

However, since the 1980s, transgender rights have regressed in Malaysia. Islamisation policies and the political use of Islam by leaders eager to shore up and maintain their own power began to create an environment that was more hostile towards transgender people. Fatwas and new legal prohibitions on cross-dressing came into force. Policies on sex-reassignment surgery and changing gender markers on official documentation became less clear and more restrictive and official support for transgender associations came to an end.

This means that the situation now for people in Malaysia is very different from the past. This is not to say that the historical acceptance of transgender people has faded entirely from public memory, but the official legal and political position on transgender rights is much more stringent. This leads to situations such as a case in Bahau in 2014, where 17 transgender women were arrested at a wedding. The transwomen were all invited guests, present at the wedding as *mak andam*, but were arrested under Syariah provisions that prohibit ‘men posing as women’.

## 2 The law

Discriminatory and persecutory laws remain a huge obstacle for transgender people in Malaysia. Although Malaysia is a secular state, Islam is recognised as the state religion and the legal system consists of a federal constitution, civil law, which applies to all citizens, and Syariah (Sharia) law, enforced by each state’s religious department and applicable only to Muslim citizens. However, the combined impact of the recognition of Islam as an official religion and a population that is 60 per cent Muslim makes Islam influential within Malaysian law, politics and society and Syariah prohibitions can and do impact the non-Muslim transgender population.

The most problematic Syariah provisions for transgender people are those laws that prevent the wearing of women’s clothes or ‘posing as a women’ by ‘male persons’. Some states prohibit cross-dressing or posing as a women in any public place, which means that depending upon where they are, transgender women risk repeated arrest or harassment while carrying out day-to-day tasks – driving or shopping suddenly become risky activities. This situation is further complicated by the lack of clarity that exists when it comes to Syariah provisions around cross-dressing. Not only do these laws vary from state to state, but they are also often vague in their definitions of women’s clothing, or what a public place is. Unlike the civil legal system, the Syariah system lacks standardisation, with the law and its application dependent upon the interpretation of the religious texts by scholars and rulers. These interpretations can differ from one state to another.

This means that Syariah provisions concerned with transgenderism are often unclear, open to interpretation, arbitrarily applied and different in different states. Transgender people cannot be sure of how they will be treated by authorities from place to place or from state to state. The effect of this is a very disempowering or un-enabling environment for transgender people and a climate of fear and uncertainty in relation to the law. Not only is there a real but undefined risk of legal persecution, transgender people are also unable to count on the law’s protection – hate crime, violence and harassment are unreported and not investigated.

In some cases, the operation of the law is literally a matter of life and death: the death of Aleesha Farhana

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in 2011 remains a shocking example of the pressures that transgender people face. Aleesha's application to change her gender on her identity documents was rejected in 2005, despite the fact that an earlier case had set a precedent allowing the changing of gender markers on official documents. Aleesha had the support of her family and had sought the ruling in order to enable her to continue with her studies. After the case, she and her family faced a huge amount of extremely negative attention and publicity. She suffered from severe depression and died of a heart attack, without ever gaining proper recognition of her gender.

### 3 The effect of religion, law and politics on transgender people's lives

Syariah law acts as a major barrier for transgender people in Malaysia, but the law exists within a wider political, religious and social context that also impacts upon transgender lives. Islam's recognition as the official religion of Malaysia and the large Muslim

population means that the interplay between religion, politics and state power can have very negative effects for transgender people. In the hands of some government officials, Islam has become a political tool that is used to avoid criticism or even questioning. By painting opposition as 'un-Islamic', political and religious leaders are able to sidestep difficult questions and consolidate their own power.

This makes it very difficult for transgender organisations to work with state or government authorities. Some state authorities

may be privately receptive to arguments put forward by transgender organisations but while transgender issues remain so politically charged and religiously complicated, few politicians or departments are willing to risk their own careers by publicly supporting transgender rights.

Unfortunately this means that a very particular view of Islam and of transgenderism influences the way in which state authorities interact with transgender organisations. In some cases, this has led to outright hostility and the loss of funding for organisations that work with transgender people or advocate for transgender rights. In other cases, it has meant that government departments have adopted limited or unhelpful policies when working with transgender people. For example, some religious organisations have been involved in health work, but an unwillingness to engage in preventative work or to encourage the use of condoms in preventing HIV/AIDS has limited their ability to work effectively with transgender people, particularly given an IBBS (integrated biological and

behavioural survey) report (Malaysia AIDS Council 2010), which found that one in ten transgender women was HIV-positive.

Similarly there are collaborations between religious agencies and government ministries. In particular, one ministry has a budget that is used for a corrective programme that involves the setting up of camps to which transgender people are sent in order to reform and repent. The camps were billed as outreach organisations and were originally seen by transgender people as a possible opportunity to engage with state authorities. However, these camps had no intention of listening to or engaging with transgender people's assessments of their own needs – instead they aimed solely at religiously influenced reformation and repentance. Re-education or reformation camps are also found in education, where a fatwa has been issued in which any children who are seen to be gender non-conforming are sent to similar kinds of camps intended to make them more 'manly'. From an early age, therefore, gender non-conforming people face disapproval and pressure to change.

These are just a few examples of the way in which politics and religion feed into each other to create a very difficult situation for transgender people in Malaysia. Most media outlets also play a role in perpetuating the religious and moral narratives put forward by the state. For example, several newspapers have reported on re-education camps and have featured pictures of transgender women engaging in activities considered to be 'masculine' such as football or outdoor sports. These pictures were accompanied by a report that the transgender women were men and that they could be 'changed' or cured.

Legally and politically, therefore, the position of transgender people in Malaysia is precarious. The political use of Islam can often create a hostile or difficult climate and transgender people cannot depend upon the protection of the law. The most significant and worrying impact of this is the effect that this has on the ability of transgender people to find stable employment. Large numbers of transgender women are involved in sex work, which makes them even more vulnerable to legal persecution and unable to depend on legal protection. This marginalisation makes it even more difficult to secure stable employment and often leaves people at risk of homelessness, social rejection and an ongoing cycle of vulnerability and marginalisation.

### 4 Justice for Sisters: working for change

The key barrier for transgender people in Malaysia remains the operation of Syariah laws against cross-dressing. The primary aim of the organisation Justice for Sisters is therefore legal reform for transgender rights in Malaysia through strategic litigation and community empowerment. The case in 2014 in which

“Not only is there a real but undefined risk of legal persecution, transgender people are also unable to count on the law's protection.”

section 66 of the Syariah law in the state of Negeri Sembilan was found to be an unconstitutional violation of transgender women's rights is a huge victory and an important precedent (see article in this section by Paiva for further details), but the pressing need for further legal reform remains.

There are a number of strands to bringing about this reform. First, in order to bring challenges forward the community must be empowered and aware of its rights. Change needs to come from an informed, empowered community. Justice for Sisters runs empowerment workshops for transgender people, seeking to build capacity within the transgender community in Malaysia. We also have an online media presence with YouTube videos aiming to educate about transgender issues. So far, we have run empowerment workshops in six of Malaysia's 13 states; the goal is to work in all 13.

Second, legal challenges to persecutory laws are needed. To do this there is an urgent need for lawyers who are able to bring test cases and work *pro bono* on transgender issues. Education and engagement work – for example, going into universities and working with students does bring results – but lawyers with in-depth knowledge of the constitutional, civil and Syariah systems must play a role in the legal challenges that transgender people face. Our goal is a legal clinic throughout Malaysia, staffed by lawyers with a good knowledge of transgender issues, able to bring cases throughout the country – at present

the lawyers working with Justice for Sisters are based in Kuala Lumpur, which means that there is a geographical limit on what can be done.

Third, funding remains an ongoing need. The transgender community has capacity, contacts and knowledge, but we need funding for programmes, campaigns and legal challenges and to support our members and transgender people facing persecution or marginalisation.

Fourth, there is a role for the international community to play. This does not mean that international activists or organisations should take over or speak for transgender Malaysians, but support from international organisations is helpful and welcome. We already have good relations with organisations such as Human Rights Watch, but further contact or support from international lawyers or people with legal knowledge could help with the legal aspect of our campaigning. A number of international companies and businesses also have bases in Malaysia. These companies could also play a role in providing employment for transgender people and creating transgender friendly policies and working environments.

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## Homophobia in Africa

NAOME RUZINDANA

### 1 Anti-gay legislation in African states

Ugandan and African culture and society was historically a patriarchy where both society and religion recognised a relationship as between a man and a woman. Culturally, sex was a private matter that was not discussed, and behaviours such as holding hands or kissing were not exhibited publicly. In spite of the patriarchal social structure, homosexuality has existed in Africa for centuries. It was never a Western influence, nor is it adopted from the West; the only thing that was adopted was Christianity and homophobia.

Just when we thought that the situation was getting better for lesbian, gay, bisexual, transgender and queer (LGBTQ) people, it instead worsened and a number of African states have sought to strengthen laws against homosexuality. Recently, the bar of persecution has risen higher and higher year on year. States such as

Kenya and Rwanda have threatened to pass anti-homosexuality laws; others, including Nigeria, Burundi and Uganda, have proudly enacted new legislation.

The laws surrounding homosexuality vary from state to state in Africa: not all states criminalise homosexuality, and some of those who do rarely enforce criminal penalties. However, a large number of states retain or have recently strengthened laws prohibiting homosexuality or some homosexual acts. Penalties can include fines and imprisonment for long periods of time. Some states, such as Nigeria and Uganda, also prohibit forms of gay rights advocacy or same-sex marriage.

### 2 The impact of increased persecution

Legislation such as the Ugandan Anti-Homosexuality Act has caused a lot of

#### Naome Ruzindana

is a national of Rwanda currently residing in Sweden where she was granted asylum on the basis of persecution related to her lesbian, gay, bisexual and transgender (LGBT) human rights work. She has significant experience working with the LGBT community in Eastern Africa and Africa as a whole. Her human rights work has been widely recognised and she has participated in European Parliamentary and United Nations panels on LGBT rights. Naome is the founder and CEO of Find Hope – an organisation that works with LGBT refugees, asylum seekers and young people in Sweden.



▲ Demonstration at the Uganda High Commission in London against anti-gay legislation and a proposal by the British government to deport gay activists.

“We grieve for our sovereignty that we lost because of who we are.”

trouble and suffering for people who are LGBTQ and those who are their friends. The legislation has caused many LGBTQ individuals to lose their jobs and friends, to be isolated from society, evicted from houses by their landlords and landladies. Some have been expelled from schools. And some have chosen to go back into the closet rather than being identified and excommunicated from the society. It has caused many to lose their dignity and safety in their own country. As the level of hatred, hate

crime, discrimination and intolerance based on sexual orientation and gender identity increases we become second-class citizens in our own countries. It has also forced some of us to abandon the struggle that we fought for through all our years of youth. We are now refugees in foreign countries!

Throughout Africa, politicians have diverted their attention to legislating against homosexuals instead of concentrating on representing their constituencies and improving the situation

of the people that elected them to power. Some countries have lagged behind because of focusing on legislation of bills that criminalise same-sex activity rather than on legislation that might improve the

economy or society. Uganda, for example, spent five years discussing the bill and rotating it from the legislature, to the courts and religious authorities. This has wasted a lot of taxpayers' money and energy that could have gone towards other profitable activities for the nation.

This journey for LGBTQ Africans is so difficult to describe: it is a journey that is only walked by a person that truly understands it; a journey that you walk alone; a journey that is hated most; a journey that isolates you from your family, relatives, friends, colleagues and also the government that is supposed to protect you. It truly needs persistence, strength and passion in order to understand this journey.

We grieve for the sovereignty that we lost because of who we are. African leaders have continued to undermine the fundamental basic rights of sexual minorities: our rights of freedom from discrimination and freedom to privacy and assembly are enshrined in our constitutions but are denied to us on the basis of our sexuality or gender identity.

### 3 The situation of LGBTQ refugees

This persecution has affected many people. Some have survived, others have died and others are still struggling to find safety. Some have fled their own



countries and sought asylum elsewhere, including Europe.

This creates huge problems because refugee numbers in Europe are increasing daily. This increases the fear of being doubted by state authorities and leads to many people remaining in Europe without permission to stay. There are now more LGBTQ people seeking asylum than in the years before our countries passed the new anti-gay laws. This has caused many LGBTQ refugees to mix with heterosexual refugees, which leads to greater risks and conflict within the immigration camps, because the immediate problem is fellow heterosexual refugees. They harass LGBTQ individuals and enact their original hatred from their respective countries. A key priority in our experience has been to convince state authorities to separate the two populations. State authorities are often reluctant to do this – they feel that it is discriminatory and would limit people's right to association.

To gain refugee status, LGBTQ people have had to do a lot to convince the European countries of their sexual orientation and gender identity. Some have failed to do this, because their asylum application was their first ever coming out – they had spent their lives hiding their sexual orientation or gender identity and found it difficult to openly admit their sexual orientation or gender identity to immigration officials. There is no way you can come out, and for the first time that you do so to a foreigner, with lawyers surrounding you and interpreters who may have been homophobes from the very country you ran from! Coming out is a process, nobody has ever come out just once, so it becomes a double stigma to come out in a foreign country, surrounded by strangers and struggling to convince them to accept your truth.

For some of us it was the first time that we had even boarded a plane, or seen white people, so meeting and talking with them for the first time is a dilemma. Moreover, sex in African culture is very secretive traditionally, religiously and socially – we do not discuss sex or exhibit it publicly. Those who do are regarded as prostitutes. This means that it is very hard for us to discuss it with strangers and for the first time to convince them to accept us as sexual minorities, particularly as they have little understanding of our experiences or culture.

Many of our LGBTQ colleagues still struggle to find security in their own countries, some have found safety in second countries, but others have even been denied refugee status by the United Nations High Commissioner for Refugees (UNHCR) or by European states because they are doubted. Some have been arrested and detained; others have decided to return to their homes to face the law.

It is because of this and more, that I decided to form Find Hope to keep us together, preserve our culture, create our visibility and attain a platform where our issues will be aired.

## 4 Find Hope

The process of obtaining refugee status in Sweden is complex. About half of LGBTQ refugee claimants in Sweden are unsuccessful and may be sent back to their home country. Since December 2014, Find Hope has worked with LGBTQ refugees in Sweden. Leaving your home country to seek refugee protection can cause significant mental stresses, financial costs and physical risks, so our focus is to help these people get permission to remain, to secure good lawyers and counselling to help them through their trauma, and to follow up their cases.

Our aim is to create a strong visible platform for LGBTQ refugees not only in Sweden but also throughout Europe. To do this we need strong advocacy that highlights all challenges that LGBTQ refugees are facing, documenting their stories and confronting authorities to push for mechanisms that protect them. We seek to strengthen the relationship between the refugees and inhabitants, to break the prejudice that thinks refugees are gold diggers and liars.

Find Hope's working model is led by newcomers and young people, enabling them to use their own first-hand knowledge and experience for their own benefit. The needs of LGBTQ refugees are complex and include legal, political and social challenges. Alongside its provision of practical legal and social support, Find Hope works on awareness raising and outreach that draws attention to these many challenges.

No one understands us more than ourselves; we are here to tell our stories ourselves, however difficult that might be. We grew up in sensitive conservative societies, where sex is not mentioned in public or exhibited in any way that can be public. It has become so difficult for us to come out in foreign countries and to strangers in interview rooms where many have gathered to hear our personal life stories. It scares us, because for some of us it is our first time to come out of the closet; we fear a lot, because we still think that this will definitely reach the people from whom we came running and hiding.

These are some of the stories that forced me to form Find Hope.

“It has become so difficult for us to come out in foreign countries and to strangers in interview rooms where many have gathered to hear our personal life stories.”



# Materialising Sexuality, Poverty and the Law

SVATI SHAH

## Svati P. Shah

is an Associate Professor of Women, Gender and Sexuality Studies (University of Massachusetts). Previously, she was awarded a Postdoctoral Fellowship in Sexuality Studies (Duke University), and was Visiting Assistant Professor at Wellesley College and New York University. Svati has a PhD from Columbia University's joint doctoral programme in Anthropology and Public Health (2006), and holds a Master of Public Health (Emory University). She has published extensively, including *Street Corner Secrets: Sex, Work and Migration in the City of Mumbai* (Duke University Press, 2014). Svati also works with charitable foundations and community-based organisations, both in the US and India.

In this short essay, I aim to sketch some connections between the terrains of sexuality, poverty and the law. That these concepts and attendant discourses have been produced as being distinct from one another is surprising, if not counterintuitive. This move has required conflating sexuality and individuated subjectivity, which, in its turn, prioritises concerns of sexuality with respect to questions of free will and individuated sex practices, that are then collectivised among a group of people whom we might call 'sex workers', 'queers', etc.

An analysis that focuses on sexuality as, among other things, a discourse of materiality and, more broadly, constituted by questions of political economy, may be understood, in this discursive moment, in the terms of an intervention that helps us to move away from a reification of individuation that has become particularly legible in the glare of so-called neoliberal economic policies. The cast of this kind of intervention is clear within the context of the discourse on sex work, for example, where questions about women and girls selling sexual services are increasingly subject to interrogations of 'being' rather than

to questions of 'becoming'. In other words, the engine of individuation within discourses that reference sexuality, like the discourse on 'prostitution', has measurably succeeded in rendering prostitution as a state of being – an identity or a historical fact, so to speak – from which people must be rescued. In this discursive matrix, sexual commerce is precluded from being considered as a livelihood strategy that is part of a complex set of negotiations for daily survival. While there is much that can and should be done to improve the lives of people selling sexual services, 'rescue' has been shown to be ineffective at best. The problem extends to conflating

the selling of sex services with human trafficking, thus deprioritising and, in some cases, disappearing the question of survival. There is a connection here with lesbian, gay, bisexual, transgender and queer (LGBTQ) politics in that identitarianism has perhaps unwittingly served to marginalise questions of political economy with respect to sexuality, an argument that has been made avidly by self-identified leftist queer and trans thinkers, who, for over a decade, have pointed out that 'gay marriage' marginally expands the terrain of citizenship rights for those with means, while doing little for those outside of this purview.

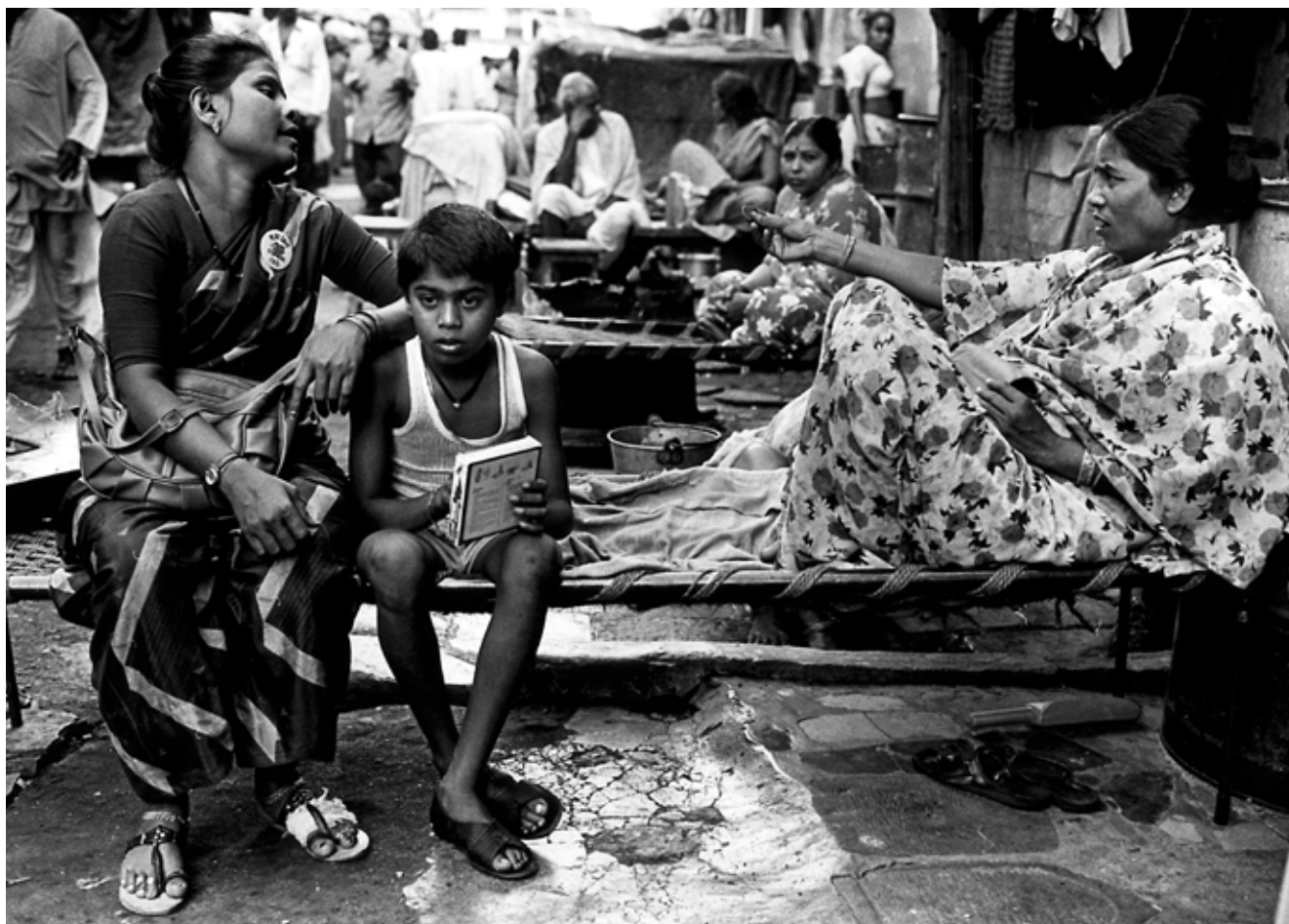
While drawing comparisons between 'rescuing' sex workers and marrying queers is beyond the scope of this piece, it is possible to draw links here between the consequences of reifying individuation within these two dominant discourses of contemporary sexuality politics. For example, individuation within discourses of sexual commerce and of LGBTQ politics both focus on the idea of origins, of the moment when an individual subject knew, came out, was forced, was called into being, as a victim of prostitution or as a gay person,

possessing neither a past nor a future, blurring the connections between sexuality and access to water, land, livelihood and the exercise of state power on the urban street.

If the first set of connections we might elaborate between sexuality and poverty revolves around the problematic of individuation and a depoliticised worldview, then the second set of connections may be articulated as the problematic of time and temporality. Here I am thinking about temporality because of the ways in which notions of progress are being produced in relation to shifting boundaries of sexuality and sexual subjectivity,

particularly in the non-Western world. Through my work in India, I have noticed that it has become virtually passé to say that the anti-trafficking discourse is 'dominant' or that it has 'gained prominence'. It seems that trafficking has become a lens, an invisible filter, for understanding prostitution; it has ascended to that status of that which is 'known' about sexual commerce, that it is an instantiation of 'trafficking',

“...the engine of individuation within discourses that reference sexuality... has measurably succeeded in rendering prostitution as a state of being – an identity or a historical fact ... from which people must be rescued.”



where trafficking is a euphemism for prostitution. If sexual commerce is trafficking, then of course it must be eradicated; this conceptually produces prostitution/trafficking as representative of something that has happened from time immemorial, a vestige, a version of the past that blights the present. If human trafficking represents the past, it so happens that, at the same time, gay rights take on the cast of the future.

I would ask us to observe the compounding effects of these distinct discourses of sexuality, where sex workers, who are increasingly marked as regressive vestiges of human trafficking, face erasure from public view, while the idea of gay rights, which are normatively embodied in public discourses as urban affluent gay men and transgender women, are being figured within discourses of Indian national progress and prosperity. This goes beyond India, as international policy organisations and individuals embrace gay rights as a mode of progress, as something that modern nations do, and as something that countries that want to be part of the community of nations should embrace. In other words, If sex workers have been subject to 'temporal distancing', which is something that anthropologists have been thinking about for a long time, then perhaps gay rights is increasingly framed as a sign of the times.

There is more to say about temporality of course, but the last thing that I would raise here is a gesture towards the quotidian materiality of these issues, which is brought into particular relief through an engagement with the law, both in its formal incarnations, and as it is unevenly enforced on the street. The material effects of these problematics are remarkable with respect to rapidly changing built environments in cities like Mumbai. In my own work I have been noticing that there has been an attrition of urban red-light districts in India, which also happen to be in older and centrally located areas of the city. These areas are being redeveloped as high-end housing and shopping districts as quickly as possible. I believe this phenomenon serves to remind us of the basic fact that poverty has a physical form. It has an embodiment that is not only a person but also a place, and the politics of erasure and visibility are also ways of managing, acting upon, and perhaps even transforming at least what we think we see when we see a red-light district, a shopping mall and the people who inhabit these spaces. Rather than seeing these changes as straightforward instantiations of progress, a view toward contextualising these within a discourse like that of sexuality serves to show the ways in which these transformations are also a form of stasis, an instantiation of the production and maintenance of class- and caste-based hierarchies.

▲ A former sex worker in the red light district in Mumbai, India, now working for the anti-AIDS organisation IHO, with a sex worker and her son.

# 'Getting it Right': HIV, Women Who Have Sex with Women and South Africa's Law and Health Policies

TATENDA MURANDA

## 1 Introduction

We must more than ever stand on the side of human rights. We need human rights. We are in need of them and they are in need, for there is always a lack, a shortfall, a falling short, an insufficiency; human rights are never sufficient. (Jacques Derrida, *Philosophy in a Time of Terror*, 2003)

The aim of this article is to interrogate some of the factors that have contributed to the marginalisation of women who have sex with women (WSW) in contemporary South African HIV/AIDS policies and discourses. South Africa is in a unique position among African countries because it has enacted Constitutional provisions that guarantee rights to gender equality

and non-discrimination on the basis of sexual orientation while also providing for the realisation of socioeconomic rights. In the context of the HIV/AIDS pandemic the robust human rights environment presents unique opportunities for the mobilisation of civil society actors and other interested parties for the protection of the rights of people living with HIV and AIDS (PLWHA) and people affected by AIDS.

On paper the right to non-discrimination on the basis of sexual orientation implies a social environment where the normative order or 'collective understanding of stigma-normal processes' (Kusow 2004) is not bound by expectations of heterosexuality. In other words the Constitution attempts to construct a social order devoid of heteronormativity.

Laws have done very little to protect the rights of WSW whose amorous practices and lifestyles counter heteronormativity (or non-normativity). This article seeks to unpack this phenomenon by looking at the history of South African applications of human rights to HIV/AIDS and non-normative people. It will

also look at how discourses have shaped limiting ideas about African sexualities, the drivers of the pandemic and how these have influenced policies in ways that have 'disappeared' WSW. In doing so this article criticises the ability of existing human rights norms, principles and notions of justice to adequately protect the interests of WSW and advances an argument in favour of the incorporation of the sexual rights principles embodied in article 14 of the Maputo Protocol (African Union 2003) on the rights of women.

### 1.1 Human rights and public health

The purpose of linking public health and human rights is to advance human wellbeing beyond what can be achieved through isolated public health or human rights approaches (Mann *et al.* 1994: 10–11). The African Commission on Human and Peoples' Rights (ACHPR) (hereafter the Commission) considers HIV/AIDS to be a serious threat to the human rights of Africans (Gumedze 2004) and therefore issued a resolution (ACHPR 2001: 2) calling upon African governments to adopt human-rights-based approaches when dealing with the impact of the pandemic (Balogun and Durojaye 2011: 378). According to the resolution, African governments should 'allocate national resources that reflect a determination to fight the spread of HIV/AIDS' (ACHPR 2001: 2) as the 'pandemic is a human rights issue which is a threat against humanity' (*ibid.*: 1).

In this context South Africa has been hailed as the 'jewel' of the continent because of its pro-equity approach to public health and the Bill of Rights within its Constitution. For the purposes of this inquiry the most salient features of the Bill of Rights (1996)<sup>1</sup> are its provisions on the right to health (article 27) and equality and non-discrimination (article 9). In *Case CCT 21/95*<sup>2</sup> the Constitutional Court stressed that the rights within the bill of rights should be understood as being part of a 'mutually supporting' (CCT 21/95: 27) web. It is therefore important to consider how several rights may be implicated by a particular public health approach and how seemingly minor oversights may have dire consequences for less visible social groups.

Human rights considerations were first applied to South African HIV/AIDS policymaking in 1994 with

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the adoption of the National AIDS Plan (NAP). This plan sought to chart a new path through emphasising the importance of law reform in tackling the HIV problem (Cameron 2006: 56). The NAP emerged from a deliberative process by the National AIDS Coordinating Committee of South Africa (NACOSA), featured contributions by anti-apartheid gay activists (Mbali 2005: 2) and reframed HIV/AIDS as a 'developmental and human rights issue' (Fourie 2006: 176). Despite these seemingly radical developments HIV/AIDS policy development and implementation in the post-1994 period has proved to be disappointing for counter-heteronormative women (Tallis 2009; Judge 2008).

### 1.2 The risks of vulnerability and the vulnerabilities of risk

Globally HIV epidemiologists and social scientists have struggled with the concepts of risk and vulnerability and the ways that they should be attached to people (Patton 2005: 47). Approaches that focus solely on behaviour have been criticised for their failure to consider the socially dependent nature of sexual practices and how structural imbalances work to increase or diminish risk; while approaches attaching these concepts to identity are rejected for the deficiencies created by the inherent volatility of social identity markers. Another problem with identity and behavioural approaches is their susceptibility to bias and distortion, particularly because social regulation and erasure through silence have proved to be powerful ways of removing non-normativity from the public space. Therefore, while concepts of 'populations at risk' and 'vulnerability' purport to have an inherent objectivity – which I

argue extends only in so far as they identify disparate power dynamics – they are actually highly subjective and contestable.

The internal incoherence of these concepts – which are simultaneously both objective and subjective – affects policy creation because it becomes impossible to use generalisations to identify the needs of certain population groups. In other words the notion of 'vulnerable groups' is so broad and imprecise (McIntyre and Gilson 2002: 1650) that it impacts on a state's ability to adequately recognise and acknowledge health problems within marginalised sub-groups of an acknowledged vulnerable group (Mann *et al.* 1994: 13). This point is illustrated by the marginalisation of WSW in discourses about women and their vulnerability to HIV/AIDS.

The categorisation and compartmentalisation of individual bodies is the central feature of 'HIV discursive practice' (Logie and Gibson 2013: 31). In a phallogentric society comprising hierarchies of gender and sexual practice this translates into hierarchies of HIV transmission wherein 'more likely' routes of transmission trump 'less likely' routes (*ibid.*). Historically WSW have been socially and medically constructed as 'not at risk' for HIV infection because sexual transmission of HIV/AIDS between women

“While concepts of 'populations at risk' and 'vulnerability' purport to have an inherent objectivity ... they are actually highly subjective and contestable.”

▼ Ndumie Funda, director and founder of Lulek' iSizwe LBT Womens's Project, a charity that assists Lesbian, Bisexual and Transgender women in the townships of Cape Town.





is assumed to be low or non-existent (Patton 2005; Sandfort, Baumann, Matebeni, Reddy and Southey-Swartz 2013). This has meant lesbian health issues have been 'disappeared' from public health agendas (Tallis 2009: 116). However, these assumptions about lesbians are problematic because of the limited ways in which lesbianism is understood.

Typically, lesbian women are understood as unlikely to have any sexual contact with men. However, Southern African studies have repeatedly shown that many lesbian-identified women have had voluntary and forced sexual encounters with men (Matebeni *et al.* 2013; Poteat *et al.* 2014; Sandfort *et al.* 2013; Van Dyk 2010). This indicates the ways in which the lesbian identity is a contested one and the variations in the ways that women perform this identity make generalised beliefs about 'lesbian risk' highly problematic, particularly because they appear to emerge from the ether.

## 2 The context

Human rights manifestations vary from country to country despite one state's provisions being worded similarly to that of another state or an international treaty. The degree to which states disagree on the content of a right depends on the nature of the rights themselves. Therefore, while it is common practice to speak about rights as though they are 'absolute, true and universal', the reality is that they are contested concepts that are constructed differently over time (Mbali 2005: 3).

A powerful argument for the variation in the manner in which rights are interpreted and applied is presented by Steiner (1988), who classifies human rights along a spectrum, with one end being rights that share 'near-universal consensus' and the other end, wherein equality and socioeconomic rights lie, being rights that have disputed meanings and content. He attributes this lack of consensus to the fact that rights are understood in the context of incompatible political ideologies and practices. Within South Africa the issue of HIV/AIDS has persisted as one of 'high-politics' (Schneider 2002). This is because of the symbolic significance of the virus. HIV calls into question prior cultural understandings of sexual practice (Jones 2005: 425) and rubbishes simplistic formulations of affected people as 'innocent victims... [or]... guilty perpetrators' (Reddy 2010: 437).

The manner in which South African activists and members of the legal fraternity have deployed human rights principles in the context of the pandemic has varied considerably over the last 20 years. The first phase saw the fight being framed in terms of civil and political rights while the second phase sees HIV/AIDS litigation and discourse being framed in terms of socioeconomic rights (Mbali 2005: 4) – particularly the right to health.

### 2.1 HIV, non-discrimination and access to health care

Discourses of affordability began to emerge around issues of access to health care for PLWHA in the early 1990s and as early as 1993 there were instances of health-care authorities denying PLWHA access to 'expensive drugs and treatments' for fear of putting strain on the country's national medical resources (Cameron 1993: 26). A recurring theme in discussions about HIV/AIDS interventions is costs versus need. In *Van Biljon v Minister of Correctional Services* (1997 (4) SA 441 (C)) the High Court importantly highlighted that cost was an inadequate justification for depriving seropositive people of 'adequate medical treatment' and that social context was an important consideration. Unfortunately this did not immediately translate into wider access highly active antiretroviral therapy (HAART). What is clear from legal jurisprudence, however, is that cost arguments cannot be used to justify denying marginalised groups, which includes WSW, access to HIV/AIDS-related health care. Still WSW remained excluded. This raises questions about how the right to health care has been understood, since non-discriminatory access to health care for PLWA has done little to protect the prevention-related needs of queer women, regardless of their serostatus.

The state's impotent approach to ensuring the right to health care for PLWHA was called into question in the widely discussed case of the Treatment Action Campaign, (TAC) (CCT 9/02).<sup>3</sup> In reaching its decision the Court reasoned that the right to health care was subject to budgetary considerations, which meant that it had to be progressively realised 'within... [the]... available resources' (*ibid.* para 29) of the state. The Court further held that while the state was under no obligation to go 'beyond available resources' to immediately realise the right (*ibid.* para 30), it was obligated to 'take reasonable measures... to eliminate... the large areas of severe deprivation' (*ibid.* para 33) within South African society.

Given South Africa's particular history, socioeconomic rights are important instruments of redress. To this extent the seemingly egalitarian orientation of the right to health care (Bill of Rights 1996, article 27) is seen as a complement to the equality and non-discrimination provisions in the Constitution (Ngwenya 2000). This makes the *TAC* case critical for two reasons: first, it further espoused the meaning and content of the right to health, and, second, it rubbished the notion that it was acceptable for HIV/AIDS policy to fail to adapt to societal needs and use cost considerations as an excuse.

### 2.2 Non-discrimination, HIV and sexual orientation

South Africa is the only African country to recognise the right to non-discrimination on the basis of sexual orientation. This right is explicitly guaranteed within the equality clause of the Constitution and reaffirmed

by the definition of prohibited grounds within the equality act.<sup>4</sup> Of all the Constitutionally listed grounds for non-discrimination, sexual orientation has been adjudicated on the most (Currie and de Waal 2005: 251) so there are numerous cases dealing with the issue.<sup>5</sup> The reality of long-term, affectionate and companionate homosexual bonds existing has also been acknowledged by the Courts.<sup>6</sup> This has made South Africa one of the few places where, on paper, counter-heteronormative people experience full citizenship.

The concept of citizenship entails the distribution of enabling resources, provision for equal recognition irrespective of difference and access to mechanisms for gaining representation (Klugman 2007). Policy is important to the realisation of citizenship because it is the application of human rights principles and laws to real life. Therefore it can be said that policy shapes the nation's reality.

In the wake of the TAC's victory in the case, the Mbeki government re-evaluated its policymaking approach and consulted with members of civil society in order to develop 'a comprehensive HIV treatment and prevention plan' (Mbali 2005: 2). The result of the repaired relationship between the state and civil society was the roll of HIV/AIDS treatments at public health facilities (*ibid.*) and the inclusion of lesbian, gay, bisexual and transgender (LGBT) organisations, representing men who have sex with men (MSM), in the drafting process for the 2007–2011 *HIV and AIDS and STI* [sexually transmitted infections] *National Strategic Plan* (Rispel and Metcalf 2009: 178).

The complete neglect of the needs of WSW in the 2007–2011 *National Strategic Plan* is surprising considering that it has been widely acknowledged that LGBT organisations played a critical role in the formulation of this policy document. However, the LGBT community is a sub-set of a society where 'the gender system fosters power imbalances' (South Africa Department of Health 2007: 32) and therefore within the counter-normative interest groups, social hierarchies find themselves replicated in ways that subsume the voices and needs of WSW (Tallis 2009; Mbali 2005).

### 3 Not women. Not heterosexual

Certain principles of social justice hold that a 'just society' is one where the state provides basic levels of health care, housing, nutrition, education and personal security and also guarantees that people are able to experience 'the major liberties', commonly referred to as civil and political rights, without any distinction or discrimination of any kind (Corrêa, Petchesky and Parker 2008: 152). Therefore, a key factor in determining whether or not a society is socially just is the ways it tolerates, accommodates and facilitates difference while also ensuring that sociostructural disadvantages are addressed. The continued invisibility

of WSW in contemporary South Africa's HIV/AIDS programming and planning has already been discussed; so the question becomes whether or not this 'oversight' amounts to an injustice and, if so, on what grounds? Is it possible that the state is, in fact, meeting its obligations to non-normative women or is there a problem with the very foundations upon which discourses about African sexuality, HIV/AIDS and women's rights are built?

Laws and policies rely on the notion of an 'essential homosexuality' (Rust 1992: 367) that treats counter-heteronormative people as though they belong to a 'discrete' group (Richardson 2000b: 37) that is distinguishable from other social groups. This is due to the liberal origins of human rights principles, which developed out of the desire to protect people from discrimination based on perceptible, or imagined, characteristics. Therefore, embedded within their internal logic are notions of what it means to belong or be excluded that construct all difference as a matter of ethnicity, meaning that people who are deemed to be non-normative are expected to share similar beliefs, patterns of behaviour, characteristics and perform homogenised sexualities in ways that are as 'essential and durable' (Robinson 1995: 22) as the ways that race and ethnicity are socially experienced.

The inherent rigidity of notions of non-discrimination translate into unyielding perceptions of 'lesbians' (South Africa Department of Health 2007: 69) and other WSW within HIV/AIDS policies – even where South African Courts have found that 'rigid and inflexible' retroviral policies affect peoples' abilities to realise their rights in the face of the virus (CCT 9/02, para 78). The identities and behaviours of WSW are diverse (Fishman and Anderson 2003). Within this behavioural group one will find women who identify as lesbian, bisexual, pansexual, heterosexual and any other variation of sexual identity. Therefore, the ways that researchers and strategists choose to frame, and give content to, non-normative female sexualities ultimately affects the outcomes of their research and therefore policy (*ibid.*).

'Micro-denial' within this community manifests itself in reluctance to engage in safe(r) sex (Richters and Clayton 2010) and the redefinition of 'risk' using folk knowledge(s) (Butler 2005). One such 'folk' belief is that safe sex means avoiding bisexual women (Matebeni 2009). This construction of risk points to an internalisation of the idea that HIV/AIDS is a disease that affects men, and the men and women who have sex with *them*.

**“Laws and policies rely on the notion of an ‘essential homosexuality’ that treats counter-heteronormative people as though they belong to a ‘discrete’ group.”**

The 2012–2016 *National Strategic Plan on HIV, STIs and TB* [tuberculosis] (South Africa Department of Health 2011) acknowledges the diversity implicit in the term WSW by acknowledging that lesbian, bisexual and heterosexual women may also fall within this category (*ibid.*: 7). However, outside of this acknowledgement little else is discussed about how these differences may impact policy interventions. Such oversights have led certain scholars to conclude that Southern African HIV/AIDS researchers, strategists and policymakers utilise blanket strategies that overlook the heterogeneity of non-heteronormative women as a group (Matebeni *et al.* 2013). This is peculiar in a policy document that lists ‘addressing social and structural barriers’ (South Africa Department of Health 2011: 7) and the facilitation of greater ‘social and behavioural change’ communication (*ibid.*: 13) among its key strategic objectives for prevention of new HIV/AIDS infections.

“Corrective rape and heteronormative HIV/AIDS classifications work together to create a distinct form of structural violence against WSW.”

### 3.1 Social dynamics

Medical science’s failure to accurately assess how the practices of WSW affect their vulnerabilities has shaped public discourses that have since the 1980s proliferated the idea of ‘lesbian immunity’ and affected how WSW perceive their individual risk profiles. Studies show that most Southern African WSW

believe that sex between women is safe; this is reflected in a tendency to overemphasise personal and individual aspects of knowing one’s serostatus without similar emphasis on knowing the status of one’s partner (Matebeni *et al.* 2013). The former contradicts instances where similarly located study participants cite an unwillingness to re-infect themselves and/or infect their partners among the reasons for disclosing their seropositive status (*ibid.*). Disorganised and conflicting beliefs about HIV/AIDS tend to be common amongst WSW in Southern Africa (Matebeni 2009; Matebeni *et al.* 2013; Poteat *et al.* 2014) and manifest themselves most poignantly in denialist strategies of self-deceit and rationalisation.

International studies have found that WSW display higher engagement than other women in sexual and non-sexual HIV and STI risk activities (Bauer and Wells 2001; Bevier *et al.* 1995; Fethers *et al.* 2000; McNair 2005; Pinto *et al.* 2005). The extent to which WSW are likely to engage in, or be exposed to, higher-risk activities is determined by their positionality and the levels of structural violence it exposes them to (Scheer *et al.* 2002). In South Africa, race, socioeconomic status, gender and sexual orientation interact in ways that leave poor lesbians especially vulnerable to a

form of homophobic violence known as corrective or curative rape. Curative rape is a physical manifestation of a power struggle between men and non-normative women who are seen to threaten the prevailing social order (Brown 2012; Mieses 2009). Therefore, violence comes to be used as a means of teaching non-conforming women ‘a lesson... [in being]... a real woman’ (Di Silvio 2011).

If one defines structural violence as ‘preventable harm or damage... [caused by]... the unequal distribution of power and resources’ (Lane *et al.* 2004) then it follows that corrective rape and heteronormative HIV/AIDS classifications work together to create a distinct form of structural violence against WSW (Logie and Gibson 2013). This violence works through heterosexist erasure, whereby WSW are unable to appear in research or findings about HIV/AIDS in Africa. Policy, planning and resource allocation are driven by reliable statistical data (Johnson 2007) and in states with limited resources conventional wisdom holds that HIV/AIDS interventions should be determined by a country’s epidemiology. Therefore significant resource expenditure on insignificant, or invisible, epidemiological phenomena is seen as unjustifiable (Epprecht 2008: 17; Gostin and Lazzarini 1997).

The self-reported seropositive status of Southern African self-identified WSW is between 6.6 and 9.6 per cent (Poteat *et al.* 2014; Sandfort *et al.* 2013; Wells and Polders 2004), and while these figures are inconclusive, they are a cause for concern, especially in a population that is considered not at risk. Governments are only forced into action when it can be proved that a disease affects a statistically significant number of people within a social sub-group, and surveys are simply not as reliable as nationwide studies – which do not exist for WSW.

The deficiencies in current HIV/AIDS planning and policy interventions for WSW are a direct result of the state’s failure to recognise a significant problem (Fourie 2006). This is further influenced by the unique forms of social and ideological violence affecting WSW’s visibility.

### 3.2 (Hetero)sexism in policy

An overarching theme in South African HIV/AIDS prevention policy is a focus on ‘rights of penetration’ (Richardson 2000b) where the protection of the male body is given precedence over that of the female body. This is evidenced by the focus on male-controlled prevention methods and the neglect of female-controlled methods (Judge 2009). Since 2009 the government has more than doubled its epidemic health budget; however, during the subsequent period the number of female condoms distributed has consistently been between 0.8 and 1.8 per cent of the number of male condoms distributed (Mayosi *et al.* 2012).

The blanket approach of equitable access to a uniform and heterosexist set of services maintains existing levels of disadvantage by ignoring how WSW experience differential access to health and their particular needs (McIntyre and Gilson 2002). Medical triage, as is advocated by a significant statistics approach to HIV, is only justifiable where the allocation of resources is a zero-sum game where there will be clear winners and clear losers (Natrass 2004: 58). Myopic conceptions of resource expenditure, risk and the cost of health care fail to consider the long-term political, social and economic effects of neglecting WSW and how these could spill over into the general population.

### 3.3 Rights aren't always right

Scripting WSW out of public discourses on what constitutes African womanhood, female sexuality and vulnerability to HIV/AIDS has undermined their ability to fully realise their rights to non-discrimination and health despite clear Constitutional protections. This proves that social perceptions and ideologies remain some of the most powerful antagonistic forces in the realisation of rights in South Africa. Despite claims that rights are 'interdependent, indivisible and mutually supporting' (Chirwa 2003) they remain volatile normative concepts, and as such they are incomplete, partial and subject to revision over time. Therefore, as instruments for achieving justice human rights are internally flawed and cannot be uncritically applied.

Derrida (1990) argues that law is not justice, meaning that the only reason one obeys laws and upholds legal norms is because they have authority. Therefore, the question of justice cannot be treated within law; instead it must be treated as a question of the justice of the law. As it stands, prevailing legal norms have created sexual subalterns out of WSW by failing to interrogate the normative biases that have relegated their lives and needs to the periphery. It therefore becomes apparent that theories of rights and justice seeking to mitigate heterosexist systems of public regulation are required.

Given that law and justice are corollaries, albeit loose ones, the most practicable way to achieve erotic justice is through the application of sexual rights principles in the interpretation and development of pre-existing laws. In Africa the Maputo Protocol presents a unique opportunity to do this because it is the very first and only instance of the codification of sexual rights principles. The Protocol is particularly unique because it codifies the sexual health rights of *all* women with respect to HIV/AIDS. Therefore, it is worthwhile to investigate how this treaty may help in advancing South Africa's position on WSW and HIV/AIDS.

## 4 Getting it right

There is an array of non-binding resolutions and recommendations explicitly addressing HIV/AIDS and

human rights. Four broad themes can be canvassed from these soft law instruments, namely: the global AIDS strategy should reflect a deep respect for human rights, PLWHA have the right to live free from discrimination, PLWHA should have their confidentiality respected, and policies should always follow a voluntary approach that values autonomy, cooperation and consent (Gostin and Lazzarini 1997: 49). Therefore, at the level of international norm creation the centrality of human rights approaches to HIV/AIDS is established. However, as previously outlined, human rights are not without their deficiencies. Therefore, blanket statements about uniformly applying rights or enforcing them for the benefit of vulnerable groups overlook how nuances of language, knowledge and power affect the realisation of these rights. This means that the enactment of a progressive Constitution with wide protections will remain insufficient if the rights therein are not subjected to critical and reflexive interpretation.

Regional and international legal instruments offer possibilities for shaping domestic law. It is contended that nations rarely increase their protection of citizens' rights because of the pull of international law alone (Cassel 2001: 123); instead regional and international instruments work together to provide a normative basis for claims, interpretation and activism on a particular issue. The South African Constitution provides for international law to be 'consider[ed]' (1996, article 39) when interpreting the provisions of the bill of rights and also directs the Courts to interpret all legislation in ways that are consistent with international law (*ibid.* article 233).

### 4.1 The Maputo Protocol

The Maputo Protocol (African Union 2003) was adopted in order to bolster the rights of women under the Banjul Charter<sup>7</sup> and its most distinctive features are: its explicit reference to the sexual health rights of women as they relate to HIV/AIDS and STIs and articulation of the correlated obligations of states parties. Prior to this the African regional system was a mess of declarations and commitments, which did little to empower women to hold their nation states accountable for the realisation of their sexual health rights. The relevant provisions of the Maputo Protocol are Articles 14(1)(d) and (e), which read:

States Parties shall ensure that the right to health of women including sexual and reproductive health is respected and promoted. This includes: ...

(d) the right to *self-protection* and to *be protected* against sexually transmitted infections, including HIV/AIDS;

(e) the right to *be informed* on one's *health status* and on the health status of one's partner, particularly if affected with *sexually transmitted infections*, including HIV/AIDS... [emphasis added]





▲ The 13th International AIDS conference in 2000 in Durban, South Africa. Delegates and protesters on a 'global march for access to HIV/AIDS treatment' from City Hall to Kingsmead stadium.

The general comments of the special rapporteur on the rights of African women (ACHPR 2012) (hereafter general comments) elucidate the meaning of the right to sexual health in the context of HIV/AIDS, which is in accordance with the commissions mandate to 'formulate and lay down...[persuasive]...principles and rules'.<sup>8</sup>

One of the most striking features of the general comments' articulation of the right to sexual health is how it is understood as being influenced by the interaction(s) between environmental, biological and behavioural factors and how they affect female vulnerability to HIV. This is illustrated by the recognition of the right of an individual to be informed about both their own serostatus and that of their partner (African Union 2003). The right to be informed about one's health status is 'applicable to all women irrespective of their marital status' (ACHPR 2012, para 15).

Criticisms of the Protocol argue that the rights therein continue to be framed in heteronormative terms using the 'mothercentrism' of the provisions and its silence on same sex rights as examples (Balogun and Durojaye 2011). However, when one considers that the Banjul Charter, in true patriarchal fashion, locates women's rights in the context of family rights, it can be argued that the application of the Protocol to all women 'irrespective of marital status' (African Union 2003, Article 1(f)) is a clever way of deconstructing hegemonic African womanhood through utilising the words [read symbols] used to create it. Women no longer have to conform to traditional values and be wives in order for their sexual health rights to be recognised. For non-normative African women being unmarried is usually seen as a marker of their deviance, so the recognition afforded to women regardless of their marital status leaves room for the emergence of 'disruptive' but viable performances of womanhood and female sexuality (Reddy 2010: 438).

## 4.2 Applicability to South Africa

The South African Constitution provides for international law to be 'consider[ed]' (1996, article 39) when interpreting the provisions of the bill of rights and also directs the Courts to interpret all legislation in ways that are consistent with international law (*ibid*, article 233). Therefore an inquiry into the nature and meaning of sexual health rights with respect to HIV/AIDS is relevant to understanding how South African human rights can be better deployed to serve the needs of WSW.

In the South African system international treaties can only become a part of the legal corpus when they are enacted as domestic law by the legislature (Okafor 2007). Mere ratification does not make a treaty formally binding on the state and thus the Courts have tended to favour interpretation as a mechanism of incorporation (Slye 2001). The utilisation of international law in the interpretation of South African law is obvious when one looks at the cases that have come before the Constitutional Court, whose jurisprudence often incorporates international norms. What is also glaringly obvious, however, is the underutilisation of regional laws and treaties, as compared to international laws and treaties (Okafor 2007). Which would be regressive in this instance because of the unique attributes of the Maputo Protocol.

Human rights treaties are only valuable to the extent that they can coerce state action through establishing mechanisms of accountability (Gruskin, Hendriks and Tomasevski 1996). Therefore, the utility of the sexual health provisions in the Maputo Protocol will only be realised once the norms created therein have been domesticated in South Africa, through their utilisation for the development of existing rights and protections. Until that point the transformative power of sexual rights and the ways that they can be deployed to empower non-normative women will remain nothing but a theoretical exercise.

## 5 Conclusion

The human rights provisions within the widely celebrated South African Constitution create a homophilic and egalitarian society on paper. However, the reality does not quite match up. Counter-normative women continue to suffer from systematic discrimination and homophobic violence in ways that not only threaten their livelihoods but also diminish their ability to fully realise their rights in law. One of the most disturbing instances of the marginalisation of WSW is their under-inclusion in HIV/AIDS policies and prevention information. This is, arguably, because of the universal acceptance of the idea of 'lesbian immunity', despite the questionable foundations of the notions of risk and vulnerability that the idea is based on. It is commonly argued that one way to ensure that HIV/AIDS policies focus on people, and

protect minorities, is by incorporating human rights principles into public policy approaches to HIV/AIDS. Therefore the needs of PLWHA and those affected by AIDS can be placed at the centre of research and planning activities.

One of the defining features of South African HIV/AIDS activism and discourse is the incorporation of human rights principles. However, this has not led to counter-heteronormative women being sufficiently included. The omission is partially attributable to the proliferation of the idea of a monolithic heterosexual African sexuality, wherein female sexual practice and womanhood are defined in terms of their proximity to maleness. The notion of universal African heterosexuality has been aggravated by its appropriation and utilisation in regional, sub-regional and state-generated HIV/AIDS strategic documents, which has facilitated the internalisation of problematic ideas of womanhood by normative and counter-normative people.

Limited understandings of African womanhood and systematic heterosexism have led to a situation where WSW are not recognised as women for the purposes of the National Strategic Plan (NSP) and its interventions; despite global accord that women constitute one of the more vulnerable groups to the pandemic because of sociostructural and biological factors and not because of their sexual orientation. Systematic heterosexism has worked with homophobia and culturally embedded patriarchy to affect the ways that human rights are understood and applied to counter-normative women. The failed realisation of non-normative women of their rights to non-discrimination and health care with respect to HIV/AIDS has shown that human rights principles, as they are currently understood and applied, can do little to challenge heteronormativity because of their internal normative biases. Problems of formulation also mean that human rights cannot adapt to the changeability and volatility of sexual orientation and gender identities and therefore have the unwanted effect of limiting variance in ways that facilitate erasure.

The current human rights and HIV/AIDS policy climate has therefore created a society that is predisposed to a type of injustice that cannot be readily ameliorated by existing mechanisms. Therefore, one has to question the universal utility of human rights as tools of justice, particularly because they have proven themselves incapable of truly interrogating existing social conditions and deconstructing heteronormativity. Sexual rights offer interesting possibilities to this challenge because they construct a counter-hegemonic discourse that shifts the discursive paradigm and allows for non-normativity to be accommodated in ways that enable counter-heteronormative people to experience full citizenship. Article 14 of the Maputo Protocol is the first provision to codify the right to sexual health.

Even though it follows a violations model, the provisions are sufficiently broad to allow principles of interpretation to sidestep the exclusion of WSW and limited notions of the meaning of the right to health.

Traditional human rights discourses may not be adequate but there are counter-hegemonic rights discourses that are emerging to critique and challenge the 'blind spots' in the prevailing system. It is, therefore, ludicrous to advocate for rights to be discarded, but it is important to question the ways that they have been utilised to marginalise non-normative people; particularly WSW and their HIV/AIDS and general health-related needs. Rights mechanisms have to offer the possibility of change and this requires radical and broad interpretations and applications.

A robust critique of the content of the right to health and how it can be applied to WSW with respect to HIV/AIDS and other health needs was beyond the scope of this article but presents exciting possibilities for research. Particularly because there is sufficient jurisprudence to consider whether the state is meeting its due diligence requirements and question the justiciability of socioeconomic rights in particular. For now, however, it should suffice to say that domestic law should look towards African regional law more and more for its development going forward, particularly the progressive provisions of the Maputo Protocol on the rights of women.

“Domestic law should look towards African regional law more and more for its development going forward, particularly the progressive provisions of the Maputo Protocol.”

#### Endnotes

<sup>1</sup> Constitution of the Republic of South Africa Act No. 108 of 1996.

<sup>2</sup> *Case and Another v Minister of Safety and Security and Others, Curtis v Minister of Safety and Security and Others* (CCT20/95, CCT21/95) [1996] ZACC 7.

<sup>3</sup> *Minister of Health and Others v Treatment Action Campaign and Others* (No 1) (CCT9/02) [2002] ZACC 16.

<sup>4</sup> Promotion of Equality and Prevention of Unfair Discrimination (Equality) Act No. 4 of 2000 Section 1(l) (xxii)(a): “‘prohibited grounds’ are...gender, sex ... sexual orientation’.

<sup>5</sup> See, for example, *Gory v Kolver* NO 2007 (3) BCLR 249 (CC); *Volks NO v Robinson and Others* 2005 (5) BCLR 446 (CC); *Minister of Home Affairs and Another v Fourie and Another* 2006 (3) BCLR 355 (CC); *J and Another v Director-General, Department of Home Affairs and others* 2003 (5) BCLR 463 (CC); *Du Plessis v Road Accident Fund* 2003 (11) BCLR 1220 (SCA); *Du Toit and Another v The Minister for Welfare and Population Development and Others* 2002 (10) BCLR 1006 (CC); *Satchwell v President of the RSA and Another* 2002 (9) BCLR 986 (CC); *Langemaat v Minister of Safety and*

*Security and Others* 1998 (4) BCLR 444 (T); *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 (1) BCLR 39 (CC); *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1998 (12) BCLR 1517 (CC).

<sup>6</sup> *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* (CCT10/99) [1999] ZACC 17.

<sup>7</sup> Organization of African Unity, African Charter on Human and Peoples' Rights ('Banjul Charter'), 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982).

<sup>8</sup> Maputo Protocol (OAU 1986, Art 45(1)(b)).

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# What is the Scope for Joint Working to Advance Sexual and Gender Justice?

ARTURO SÁNCHEZ GARCÍA, ELIZABETH MILLS  
AND KAY LALOR

Part 2 introduced the value of understanding people's lives within a broader context, with contributions that demonstrated how the use of legal processes to attain sexual and gender justice must be understood within a wider web of policy, practice, service delivery, state and political power. However, the interplay between law, legal processes and developmental concerns suggests that in asking about the usefulness of the law, we also need to ask, 'Who is it useful for?' With this challenge in mind, the third part of the Collection is arranged around the question 'What is the scope for joint working to advance sexual and gender justice?' In asking this question, the contributions in this section bring the people – the activists – into focus. We hear about their critical, subversive

and transgressive encounters with the law and, through these encounters, learn about their joint strategies for bringing about legal, social and economic transformation. The articles in this section therefore offer practical examples of projects, as well as wider critiques of what is, and what needs to be, involved in joint working and solidarity.

The articles in this section vary from think pieces to personal reflections, from case studies to reports. While they all centre on the relationship between activism and law, the contributions do not reflect an unquestioning attachment to those identities and practices legitimised by the state; instead, they reveal fragmented accounts that disrupt, as Svati Shah describes in the previous section, a coherent 'state of being' that is carefully formulated through disruptive and unjust law.

The section opens with a report from **Nguyen Hai Yen** and **Lieu Anh Vu** on a youth leadership project,



◀ Russian riot police watch as a rainbow of balloons are released into the sky as several hundred LGBT activists hold a rally in central St. Petersburg to mark the International Day Against Homophobia.



called ViLEAD, which was undertaken in Vietnam. The ViLEAD project sought to strengthen capacity within the lesbian, gay, bisexual and transgender (LGBT) movement in Vietnam by working with young LGBT people to improve organisational and technical capacity, equipping them with both the skills to take their own projects forward and strengthening links between LGBT groups in different areas of Vietnam. The focus of the ViLEAD project was nuanced and multifaceted – their approach was on building knowledge and capacity particularly in areas of Vietnam where there had been limited LGBT activism in the past, which might then allow new spaces for action and activism to be explored. This was a theme that was echoed in a number of other contributions. **Nicolas Silva's** photo report on the work of Chouf in Tunisia describes the way in which Chouf has sought to use new spaces and forms of artwork to challenge entrenched understandings of gender and sexuality. It is significant that although the media landscape remains male dominated and laws remain in place penalising same sex or gender non-conforming behaviour, the representation and analysis of gender and sexuality within online media spaces remains an open space for finding new representations and new conversations.

Thus, technology offers Chouf a space for challenging mainstream marginalisation. **Francesca Feruglio's** report on Nazdeek's work in India, in which information and communications technology has been used as a tool in legal empowerment programmes, extends this theme. Like Chouf, Nazdeek explored the use of technology in order to address marginalisation – in this case the marginalisation of Adivasi and lower caste women in Assam's tea gardens. However, Feruglio's piece also describes the way in which technology can be used to address structural socioeconomic inequalities and marginalisation. The project outlined here involves the use of text messages to report incidences of violations of the rights to food, health, life and equality. The data gathered informed concrete recommendations and improvements, but also increased rights awareness and confidence in seeking redress among participants.

Nazdeek's work demonstrates how data collection and evidence can be used to address systemic structural and legal inequalities, including grave violations of human rights, endemic poverty and lack of access to health care. **Gyky Tangente's** discussion of a recent policy audit undertaken in the Philippines also addresses the issue of access to evidence, with a reflection on the way in which the audit drew attention to how social protection policies intended to apply equally to all often resulted in the marginalisation of urban poor lesbian, bisexual and transgender (LBT) people. The policy audit formed a solid basis of research that could be taken to policymakers to demand legislative change.

These contributions suggest that the way we design methodologies for research and intervention determines the scope of our work in addressing inequality. However, empirical research needs to draw out and recognise the personal trajectories of the activists who invest their creative and political energy into these projects. In the first section of the Collection we saw the way in which resources enable or constrain activists' work, and the double (or triple) struggles that activists have to fight in order to achieve recognition as legitimate interlocutors in the spaces in which they need to participate.<sup>1</sup> In this section, the contributors enter into a dialogue around their personal trajectories as activists and researchers, and offer insight into the political process of knowledge production, both individually and within the communities with which they interact. In doing so, the contributions highlight the way in which LGBT, feminist, legal and academic communities are themselves contested and diverse spaces – and exclusion and inequality can occur within communities as easily as communities themselves can be marginalised by the state. Moreover, the language through which we discuss these issues is itself contested, complex and embedded within broader dynamics of knowledge and power. This is highlighted in **Chloé Vaast's** reflection on the use of language, in which it is noted that the lack of self-representation available to individuals who are implicated within these knowledge/power networks is often accompanied by a lack of capacity to articulate one's own narratives or engage fully with rights language.

This dynamic of exclusion and silencing is clear in **Audrey Mbugua's** contribution. This reflective piece highlights the way in which the progressive intentions of transgender politics will be limited unless it is transgender persons who define them. She argues that transgender voices must be the voices that are heard by every institution that has the authority to mediate access to resources for a life lived with dignity. Mbugua draws on her own experiences to illustrate the way in which the challenges faced by the transgender community are often very different from those faced by the LGB community. Moreover, these challenges are exacerbated by the way in which transgender issues become subsumed into wider discourses of sexuality. And challenges faced by transgender persons in Kenya will be different from those elsewhere. She argues forcefully for the recognition that 'gender identity is not sexual orientation' and calls for a space through which transgender people can articulate their own issues.

What then does it take to have one's voice heard? The recognition of transgender rights in different legal cultures takes different, and even sometimes opposite, paths. For some, articulating the narrative of depathologisation of the transgender or transsexual identity represents the only radical and fair way to appear in front of the law (as shown in the case of Argentinian law in Regueiro De Giacomi's discussion in

Part 2); for others a utilitarian recognition of exception might more effectively open doors for critical resources (such as basic medical and legal services).

The transgressive circulation between different spheres, along with interventions from 'legal outsiders', perhaps offers a starting point for transforming how we can come to know law, rights and our role in legal and social transformations. **Ivana Radačić** speaks to this circulation and highlights the difficulty of bringing multiple perspective and narrative 'voices' into focus. In her contribution, Radačić outlines the long trajectory by which she came to be a feminist lawyer in Croatia, within an academic and legal environment that was often hostile towards both feminism and critical legal theory. While activism and academia may offer each other important insights, it is not always easy to occupy or belong in a space that straddles both spheres of action, particularly when facing hostility, persecution or simple indifference from instruments of state or academic power. At stake is the question raised in earlier articles: that of knowledge production, and the way in which different groups produce ideas about the state, law, courts and action in relation to state institutions within a variety of contexts and status quos.

The subsequent contributions in the Collection continue with the theme of knowledge production and return to the issue of voice and representation.

**Gatete TK** discusses the way in which international actors, in speaking on behalf of LGBT communities, can risk doing more harm than good, when they act without fully consulting with local partners or without reference to the particularities of local power struggles. The contribution calls for 'context specific activism' in which local circumstances, both material and social, political and legal, are taken into account when acting or calling for action. International calls for support for LGBT rights may seem like the 'right thing to do', and may be popular with Western or international audiences, but the primary consideration must always be the consequences of such public calls for LGBT rights for those who face persecution or hostility on the ground. More careful negotiation and an awareness of the actual circumstances faced by LGBT people in their homes and communities is often needed.

While Gatete focuses on the political and social consequences of the intersection of the international and domestic, **Bisi Alimi** draws attention to economics and advocacy. His contribution functions as both call to action and a warning about the type of action that should be avoided. Incorrect or misinformed assumptions about local capacities, local contexts and local politics can often lead to the mobilisation of resources in the wrong directions – towards discussion rather than action, or towards projects that are simply undeliverable. Alimi's analysis points to vital questions of (mis)communication, knowledge production and ownership of ideas between the international and the

local. His analysis of who speaks, who they speak to and who listens provokes important questions about the role of international and cross-border dynamics in LGBT activism and advocacy.

These final contributions draw attention to a theme that circulates throughout the Edited Collection: that of solidarity, and what solidarity might mean in the context of human rights, sexuality and social justice.

Often, programmes created to promote human rights in the transnational sphere have resulted in (neo)liberal projects that are overloaded with notions of equality, solidarity, liberty, autonomy and subjectivity as an all-in-one package, trivialising the meanings that have been attributed to each of them in grass-roots politics.<sup>2</sup> Transnational human rights projects seem to circulate a particular version of democratic values and expect that they be bought into and accepted, even by those who have had little say in their definition. In essence individuals risk being presented with a set of values, over which they have little control, but we 'cannot not want' (Spivak 1993: 45–46). This circulation of values

and knowledge has direct implications for the kind of politics and legal actions that take place: as Gatete's contribution suggests, old fashioned fantasies of victims and saviours that divide the world between a global North and a global South waiting to be brought to modernity, between the West that produces knowledge and the rest that has to assimilate it,<sup>3</sup> are perhaps not yet consigned to the past.

The complexities of solidarity are clearly laid out in **Adrian Jjuuko's** contribution on the mobilisation that took place to combat the Anti-Homosexuality Bill (AHB) in Uganda. As Jjuuko makes clear, the international support that was offered to those in Uganda who were working against the AHB was very much a double-edged sword. Solidarity offered many advantages: leverage, capacity building, resources and increased morale were all gained from the flood of international support. Yet at the same time, there was a constant risk that the support offered would subsume the Ugandan movement, its goals and its autonomy into international dialogues and discourses on how best to combat the AHB. Solidarity, Jjuuko's contribution suggests, must be approached with care, with respect and with the capacity to listen to local partners. This conversation will always appear as an ongoing concern in discussions on international solidarity, as **Claire House** suggests, in a contribution

“The transgressive circulation between different spheres along with interventions from 'legal outsiders', perhaps offers a starting point for transforming how we can come to know law, rights and our role in legal and social transformations.”



that stresses the urgent need for a strategy for changing the shared space for action across borders through which we encounter each other.

This publication opened with a discussion of the messiness of sexuality and social justice and the way in which we must often occupy a position at a mid-point between hope for the future and awareness of the material struggles that people face in trying to bring that future to bear. Solidarity is no less complicated and the final contributions in the Collection reflect this. These contributions are short reflections in which a number of contributors from a variety of backgrounds were asked to reflect on what solidarity meant to

them. In keeping with the other contributions in the publication, their answers are complex, unruly and thought-provoking.

Thus, as **Matthew Weait** notes, 'Solidarity means different things to different people' and to seek a single definition of solidarity is perhaps a futile task. Yet as **Tamara Adrián** comments, solidarity is also a unique and vital part of success. It is that which facilitates the 'transformation of our unequal

reality'. As Weait suggests, solidarity demands that we recognise and behave differently towards each other, in acts of selflessness, or in setting aside our different interests. Solidarity is that which helps us to challenge our understandings of how we belong: it is a commitment that manifests itself in many different ways.

Thus, a vital part of solidarity is, as **Lame Olebile** suggests, the making visible and acknowledging those power relations and principles that guide actions and activism, particularly those power relations that may be unhelpful or damaging. In exploring this **Arturo Sánchez García** emphasises the need to unlearn liberal notions of human rights and listen better to each other. He recalls arguments from earlier contributions in the Collection in his emphasis on South–South dialogues that can offer better insights into creative resistance than the insistence and repetition of rights strategies that have proven repeatedly inadequate in many cultural contexts.<sup>4</sup>

In this way, asking questions and listening is a vital part of solidarity. **Kate Bedford** reminds us that the question of 'how useful is the law for attaining sexual and reproductive justice?' depends on the capacity of law to reduce poverty. Solidarity then implies a commitment towards other dialogues that will enable a cross-issue and cross-movement discussion of new meanings for social justice, new knowledge about human rights and about those who produce such knowledge. Solidarity would demonstrate our

capacity to formulate new questions, new agendas, new relations and new friendships. It is also, as **Tu-Anh Hoang** and **Pauline Oosterhoff** remind us, a process of sensitivity to how we belong to and occupy multiple spaces, identities and positions of power within those relations and friendships.

We will not always understand everybody's struggles. We are not supposed to. Our political subjectivities shift across time and space; our needs are transformed, sometimes towards better and fairer ways to live our lives, sometimes along a dynamic that squeezes the resources with which we must navigate day-to-day struggles. That movement demands that we detach ourselves from abstract, immaterial and intellectual ideas of justice, and instead commit to ethical precepts that determine better ways to be with one another. A vital part of this is the imagination of alternative realities, but this must be done with careful attention paid to the material struggles and power dynamics of everyday life in order to imagine futures that are solid enough to transform into strategies for action. The contributions in this Collection offer ideas and starting points for how this might be better achieved, but the conversation is one that is ongoing and one that continues to demand that we listen with care.

Human rights, understood by the law and the state, are full of contradictions. But our human rights, as our lived experiences and our ideals of justice, have changed and can continue to change people's lives.

What is needed is a commitment to listening to each other. Or more accurately: we need to learn how to enter into dialogue with one another, where we pay more attention to listening than to talking. In doing so, we might start to bridge the gap between having a voice and being heard.

#### Endnotes

<sup>1</sup> These accounts were especially pertinent in Alice N'Kom's interview in Part 2, as we learnt about how she had to fight for her legal licence in Cameroon, and in the new expressions of precarity in Africa and Malaysia that were recounted by Naome Rudzindana and Nisha Ayub respectively.

<sup>2</sup> For the trivialisation and depoliticisation of ideals of emancipation see Tapia Tapia and Shah in this Collection. See also Santos (2007).

<sup>3</sup> See Gatete and Alimi in this section. See also Connell (2007).

<sup>4</sup> See, for example, Bisi Alimi, this section.

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“The conversation is one that is ongoing and one that continues to demand that we listen with care.”



◀ Concert at the conclusion of Viet Pride 2014.

# The Emergence of Young Leaders of the LGBT Movement in Vietnam

NGUYEN HAI YEN AND LIEU ANH VU

## 1 Introduction

ICS is a not-for-profit organisation for and by lesbian, gay, bisexual and transgender (LGBT) people in Vietnam working to empower LGBT communities to protect their human rights. ICS envisions Vietnam as a nation where sexual minorities are treated equally and where everyone can live as who they are and be able to contribute to the development of society. ICS objectives include (1) to increase LGBT visibility and pride through building self-esteem and solidarity among LGBT individuals and groups, increasing public awareness and understanding about LGBT issues and sexual diversity, engaging LGBT people, their families and allies in the fight against injustice faced by LGBT people at home, at school and in the workplace; and (2) to develop LGBT health and wellbeing by providing counselling, information and other essential services to LGBT people and their loved ones, mobilising social support for LGBT rights to bring positive changes to laws and policies concerning LGBT people and their daily lives.

The Vietnam LGBT Leadership Development Program (ViLEAD), which was implemented between February 2014 and June 2015, sought to train and support young LGBT leaders in Vietnam, building technical and organisational capacity, so that local groups could solve their own issues in their local areas. The programme was implemented through two training phases, small grants and coaching support and a final reflective workshop. The following report outlines the key

aspects of the ViLEAD programme and reflects on the lessons learnt from its implementation.

## 2 Background

Before 2008, the LGBT community in Vietnam was invisible. There was a lack of information about sexual orientation, gender identity and expression (SOGIE) or LGBT rights. LGBT people were not accepted in families, schools, neighbourhood areas or workplaces. They connected with each other through online platforms such as dating sites, or forums, but LGBT groups had limited capacity for outreach or capacity building. From 2009, ICS started to work with journalists and organisations (Women Union and Youth Union, counselling experts and non-governmental organisations [NGOs]) to change the portrayal of LGBT people in the media, building the very first support for LGBT issues.

In 2012, an amendment to the Law of Marriage and the Family that resolved the legal consequences of two same-sex people living together became a precious opportunity for the LGBT community and ICS, together with LGBT-allied

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**Lieu Anh Vu** is LGBT Project Manager for the United Nations Development Programme (UNDP), Vietnam. Vu joined UNDP in 2013 as the Vietnam LGBT Rights Officer for Being LGBT in Asia, where he supported the national community dialogue and drafting of the Vietnam Country Report. From 2014–15, he was coordinator of Youth Voices Count, an advocacy network of young men who have sex with men and young transgender women in Asia and the Pacific. Vu rejoined UNDP Vietnam in 2015 as the LGBT Project Manager. He holds a bachelor's degree in Professional Communication from Royal Melbourne Institute of Technology (RMIT) University, Vietnam.

organisations including the UN, to start advocating for LGBT rights mobilising for same-sex marriage.

Following the rights-based approach that ICS used to mobilise for social and policy changes in recognition of LGBT people, the voices of local communities were encouraged to speak out. Until 2012, community and public events were organised in Ho Chi Minh City and Hanoi, with few opportunities for events in other areas of Vietnam. In conjunction with advocacy surrounding the amendment, in 2013, groups of LGBT people and allies were formed in Da Nang, Can Tho, Nha Trang, Binh Dinh and Hai Phong and marked a

year full of community gatherings, public events and law consultation workshops.

Learning from LGBT movements in other countries and development organisations, ICS recognised that beside social mobilisation and policy advocacy, LGBT community empowerment is the core of the development of the movement in Vietnam. Moreover, together with promoting and witnessing the visibility and engagement of the community, ICS also noticed conflicts among groups that arose due to a lack of capacity and leadership. In response to these observations, ICS developed the very first LGBT leadership programme called the ViLEAD.

The project was funded by United

States Agency for International Development (USAID) and the United Nations Development Programme (UNDP) with support from the Centre for Community Empowerment (CECEM).

### 3 Development of the programme

#### 3.1 Key aims

The primary aims of the programme were to develop and roll out an LGBT leadership programme targeting civil society organisations (CSOs) and community-based organisations (CBOs) working with the LGBT community and to develop ICS as a centre for excellence in building capacity of other CSOs, and to facilitate networking and mainstreaming of LGBT issues.

#### 3.2 Selection and programme design

Programme applicants were sought from among LGBT people and straight allies with a strong connection to LGBT groups. Participants were required to have a pre-existing idea or plan for how they would make positive changes for LGBT issues, for group members of local areas. The call for applicants was posted on the ICS Facebook pages, reaching 90,000 people,

shared among 100 LGBT activists, groups and online web forums.

There were two main selection criteria for participants: (1) Groups' capacities, including experience of working with the community, ability to mobilise the community and commitment to the LGBT movement; and (2) Groups' initiatives, which included an assessment of the approach and methodology, the efficiency and the solving of regional issues proposed by the applicant.

During 2012 and 2013, most LGBT group members were young high school and college students. Their activities were mainly gatherings, where they connected with others, hanging out, or organising activities in response to events or campaigns that occurred in Ho Chi Minh City and Hanoi or online. As part of the application process ICS undertook a quick assessment of groups' organisational capacities, technical capacities and commitment to the LGBT movement.

There had never been a programme or training session to build leadership for LGBT people in Vietnam. In order to design the sessions, ICS drew on a number of sources, including programmes of VNIGSH (Vietnam Nation-Wide Institute on Gender, Sexuality and Health) by CCIHP (Centre for Creative Initiatives in Health and Population) and BCA (Be Change Agents) by Live and Learn. A few volunteer LGBT individuals who had collaborated with ICS in training sessions or making toolkits about knowledge of SOGIE gave us advice, and CECEM consulted on the contents of the training phases.

## 4 Training phase 1

### 4.1 Participants

The first stage of training involved 21 participants (ViLEADers), of whom 85 per cent were LGBT and 15 per cent were straight allies. All were between 18 and 26 years old. Half were students and the others had just graduated from school. Most of them had experience in organising LGBT activities, but their local activities had been undertaken alone or in response to growing social awareness or legal advocacy campaigns. None had ever participated in a leadership training programme and not all participants had a thorough understanding of sexuality issues. Some of them had never met each other offline.

### 4.2 Objectives of the training

The programme sought to ensure that ViLEADers were able to respect diversity and that they understood the role of local groups in promoting the LGBT movement in Vietnam. Skills training for participants included team development and conflict management as well as project management skills such as problem analysis, planning, activity organising and working with the media.

“In 2012, an amendment to the Law of Marriage and the Family that resolved the legal consequences of two same-sex people living together became a precious opportunity for the LGBT community.”





Young leaders from distant areas had a chance to see the movement in the larger context (May 2014).

### 4.3 Indicators

Indicators were established to ensure that the objectives of the training were being fully met. In particular the indicators sought to measure (1) solidarity, diversity and respect for all participants; (2) trust and concentration during the training sessions; and (3) willingness to implement initiatives that had been developed during the training.

To assess these indicators, organisers focused on the following:

Measuring solidarity and respect for diversity through

- Full participation in all activities and side activities,
- Willingness to get acquainted with new people and peers,
- Respectful treatment of other ViLEADers' differences,
- Feeding back to the organising team, particularly if any problems arose during the training.

Measuring trust and concentration in the training through

- Full participation,
- Punctuality and focus during training sessions,
- Feedback and questions directed towards facilitators and organisers, particularly if there were any difficulties in understanding the content of the training,
- Making recommendations about the training programme to other ViLEADers, facilitators or organisers,

- Giving feedback on limitations during or after training sessions to the facilitator and organising team.

Measuring willingness to implement initiatives after the training through

- Sending plans due to deadlines,
- Discussing initiatives with other ViLEADers, facilitators or organisers,
- Supporting organisers by participating in coaching sessions in their local areas,
- Proactive networking with other organisations or individuals to explore cooperation or issues about LGBT.

### 4.4 Methodologies

The training engaged the participation of ViLEADers in all activities. The sessions were interactive, with group discussions, case studies, experimental exercises, reflection and question and answer (Q&A) sessions rather than PowerPoint presentations or lectures. ViLEADers were encouraged to participate in side activities in breaks and during the evenings.

The training was divided into a number of sessions, which were planned with reference to the programme objectives. Table 1 outlines the objectives of the training days and the activities undertaken to meet these objectives. The training sessions were supplemented by side activities, which included a film screening and group games. There was also a final presentation ceremony to keep ViLEADers motivated rather than a usual certification giving session.



**Table 1** Phase 1 training days objectives and activities

Objectives	Methodologies
Team building and developing relationships	<p>Introductory welcome session in which members divided into groups and introduced themselves.</p> <p>Group reflection at the mid-point of the training session of their experiences of the training.</p> <p>Introduction of Tuckman's theory (Forming – Storming – Norming – Performing) and reflection by ViLEADers on the development of their LGBT local groups and definition of which phase they were in.</p>
Developing knowledge of sexuality issues	Creation of three groups: G1 had good knowledge of sexuality, G2 reasonable knowledge, and G3 limited knowledge. G2 and G3 discussed questions about sexuality and LGBT for G1 to answer.
Developing knowledge of the need for respect and diversity within the LGBT movement.	<p>ICS raised case studies regarding diversity of gender identity and sexual orientation.</p> <p>Showcasing comments about an episode of <i>My Best Gay Friends</i> on YouTube. Followed by a discussion of why people viewed the sitcom in different ways and how it might impact on how people view LGBT issues.</p> <p>Showcasing and discussion of the article 'Những điều người Đồng tính VN không nên nói/ làm nữa'. Reflection on social debates and discussing culture of diverse ideas about LGBT rights and same-sex marriage.</p>
Developing understanding of the larger context of LGBT movement in Vietnam	Identification of four areas for analysis: local provinces, Vietnam, ASEAN region, global; followed by breakout group discussion of the advancement and challenges in each of these areas since 2013 and group presentation and all class discussion of results.
Developing knowledge and understanding of leadership and diversity of team members	<p>Group activities in which teams had to work together to put a pen in a bottle, with all group members except one blindfolded, followed by group discussion. Followed by facilitator-led discussion of leadership.</p> <p>Introduction of four groups of characters – Water, Earth, Fire and Air – to help ViLEADers understand about different characteristics of group members and to aid ViLEADers' understanding of diversity in the groups that they led.</p>
Developing problem analysis	Identification, categorisation and discussion of issues faced by LGBT people in Vietnam and the root causes of these issues. Followed by reflective activities on the best methods for solving these root causes.
Developing skills of organising activities and managing risks	<p>ICS presentation and showcase of the process of organising the National LGBT Workshop 2012.</p> <p>Facilitator-led discussion of the steps that need to be taken in organising activities.</p> <p>Activities of ViLEADers grouped as organising outdoor events, organising talk shows, making online platforms; and analysing risks of each group.</p> <p>Facilitator-led discussion of identifying how to manage risks based on likelihood and severity.</p> <p>ICS sharing experience of working with the media and Q&amp;A.</p>

## 5 Coaching and small grants

From July 2014 to May 2015, small grants were given to 13 initiatives implemented in ten provinces by the ViLEADers. Over 3,000 sets of materials were provided to ViLEADers including information kits about SOGIE, booklets on coming out, LGBT rights, booklets on working with PFLAG, promotional items (bracelets, pins, rainbow flags, etc.).

The activities developed and skills used during this period were varied. ViLEADers introduced projects that sought to:

- Build visibility and positive images of the LGBT

community through participation in events such as Viet Pride and International Day Against Homophobia and Transphobia (IDAHOT),

- Promote connections and develop LGBT groups in local areas to develop self-esteem and leadership among LGBT people,
- Raise awareness and support specific groups within the LGBT community, for example through an online channel for lesbian and queer women, and by developing social support for transgender people and the visibility of ethnic minority LGBT people,

- Raise awareness of LGBT issues among youth through large talk shows in schools and by developing activities and clubs for LGBT youth.

Together with implementation of initiatives and promotion of activism, follow-up and coaching from ICS were provided to ViLEADers through emails, phone calls, social media platforms and face-to-face consultation; there was a Facebook group for discussion about team building, technical skills, fundraising and hot issues of the community. This coaching and discussion helped to support a variety of different organisational and technical capacities including:

- Developing team conflict management
- Developing transparency in implementing activities
- Mobilising the participation of the LGBT communities
- Networking
- Writing and presentation skills
- Advocacy skills
- Media skills
- Activity organisation.

Throughout the implementation of their activities, ViLEADers were encouraged to make decisions about issues in their groups and communities. Sharing opportunities and encouraging ViLEADers to learn more and develop was an important part of coaching. Ten ViLEADers proactively sent applications for or participated in other leadership and community development programmes, and one ViLEADER received a scholarship from Viet Pride 2014 Hanoi.

Together with other local LGBT groups, ViLEADers also began to organise activities in their areas without funding from the programme and to engage more deeply with the LGBT movement. Activities organised included further talks at schools and colleges, the development of blogs and videos and other media engagement activities. Support activities such as training sessions and counselling services were established for LGBT people. A large number of ViLEADers and their organisations participated in Viet Pride 2014, which took place in 18 provinces and cities with the participation of 5,000 LGBT people and their allies.

## 6 Training phase 2

### 6.1 Participants

After the first year, there were more activists engaged in the movement and playing active roles in new areas and groups. Therefore, ICS invited four new young leaders to participate in phase 2. As some ViLEADers could not arrange time to participate in phase 2, final participant numbers for phase two were 22 ViLEADers from 18 groups with activism areas including 15 provinces. The increased group

numbers meant that ViLEADers who had had strong connections with the LGBT communities initiated or engaged with groups.

Some had participated in other leadership training programmes, for example, Nguoi Khoi Xuong by the Institute for Studies of Society, Economy and Environment (iSEE), and Be Change Agents by Live and Learn. All of them knew each other via online or offline platforms.

### 6.2 Objectives of the training

The training sought to ensure that ViLEADers developed the habit of learning from doing, that they had the skills to manage teams, to manage their and others' emotions and to give positive feedback. This was particularly important because people who contribute to the local level of the LGBT movement in Vietnam are quite young, and during their activism, they have to deal with diversity of characters or networks.

Finally, the training sought to make ViLEADers united, feeling mature and deeply embedded in the movement.

### 6.3 Indicators and methodologies

The indicators that had been used to measure solidarity, diversity and respect and trust and concentration in the training in phase one remained the same for phase two. Organisers also assessed the maturity and commitment of ViLEADers to the LGBT movement in Vietnam. To do this they looked at the discussions of and cooperation between ViLEADers and their willingness to share information with each other.

The training engaged the participation of ViLEADers in all interactivities. Group discussions, case study, reflection and Q&A were the main methodologies. Experimental exercises played a great part of the methodologies in the emotion management section.

Each day of the training had a theme relating inspiration and commitment. Key objectives and activities are outlined in Table 2 (see page 94).

▼ Young leaders from distant areas had a chance to see the movement in the larger context (May 2014).



**Table 2** Phase 2 training days objectives and activities

Objectives	Methodologies
<b>Theme 'Our first step'</b>	
Developing pride in ViLEADers' contributions to LGBT movement and reflecting and developing understandings of leadership	Reflection on the year's activities and presentation of these reflections. Followed by a reflective exercise in which ViLEADers are asked to consider their leadership in relation to indicators of Initiation, Inspiration, Responsibility and Maturity.
Developing awareness of 'learning from doing'	<p>Experimental exercise: ViLEADers divided into three groups. Each group would discuss how to draw a picture of a human face. The person doing the drawing would be blindfolded and the others would observe and assist. Followed by group discussion of exercise and second attempt at drawing blindfolded. Final group discussion of what was done differently in the second attempt.</p> <p>Facilitator introduced the process of learning from doing, followed by reflection from ViLEADers on their own initiatives and activities and a final Q&amp;A about learning from experience.</p>
Developing experience of organising activities about LGBT	Facilitator introduced the exercise of how to organise different types of familiar activities to activists: an offline meeting with LGBT community; training a group of teachers about LGBT; presenting about LGBT in an advocacy workshop. Group discussion of these activities followed by Q&A and a discussion in which ViLEADers and ICS shared experiences of organising activities.
<b>Theme 'Keeping the fire'</b>	
Developing understanding of emotion management	<p>Screening of the clip 'What is it?' followed by group discussion about changes in attitude and emotion during the clip.</p> <p>Facilitator discussed emotion management: naming the emotion, explaining the emotion, adjusting the emotion and behaviours.</p> <p>Role play of ViLEADers in managing emotion. ViLEADers discussed some cases of negative emotion management and the best way to resolve these cases.</p> <p>Film screening of 12 Angry Men and discussion about the process of the film and the changes in characters' emotions. Reflection on emotion management.</p>
Learning to give positive feedback and developing thinking on cooperation with each other to bring local voices out	<p>Group discussion of changes in emotion and dynamics in the group, focusing on participation of new ViLEADers who had limited acquaintance with the group. Discussion undertaken with care and respect in order to find a solution.</p> <p>ICS-led discussion of the social movement Tree Hugs.</p> <p>Facilitator analysed the social movement ViLEADers could bring to their provinces and raising the open question: How can you work together to make your activism a social movement?</p>
<b>Theme 'The steps forward'</b>	
Developing unity, maturity and deep participation in the LGBT movement	<p>Presentation and discussion of planned initiatives from ViLEADers in 2015.</p> <p>ViLEADers grouped initiatives by targets and regions and brainstormed how to incorporate or support each other in communication and implementation.</p>
Encouraging and inspiring ViLEADers to continue to contribute to the movement	<p>ViLEADers and organisers played a game to ask for ViLEADers' solutions for obstacles that might happen in activism.</p> <p>Certification ceremony; ViLEADers gave certificates to each other.</p> <p>Flashmob and closing.</p>

The session of sharing initiatives in 2015 was a chance for ViLEADers to share ideas, incorporating and supporting each other. They had action plans to make the ViLEAD initiatives more effective to create a movement of local LGBT voices rising. The initiatives were divided into three areas: (1) Training and talk shows about LGBT to raise social awareness, especially in schools, rural and mountainous areas; (2) Enhancing the social media to support the LGBT community and provide general people with creative informative knowledge; (3) Promoting understanding to transgender people and transgender rights. A Facebook page run by ViLEADers was established and which shared implementation of initiatives and activism as the main channel for ViLEADers and local LGBT groups.

This year, I was impressed with the emotions management session in ViLEAD. Managing emotions doesn't mean you ignore it, it means you have to find your right emotions, explain them and find the appropriate behaviours. As a leader, you have to deal with lots of pressure, learning how to make decision while still managing emotions is the valuable lesson in teamwork as well as being an inspiration for my team members (Participant in the 2014–15 ViLEAD programme).

Here, I got to learn the lessons of respecting individual differences, listening proactively as well as working effectively in a team. ViLEAD gives me a second family where every member can freely express themselves while strongly bonding with and caring for one another. Whoever I become in the future, being an LGBT ally will always be my relentless ideal!

## 7 Learning workshop

A learning workshop among ViLEADers was organised in May 2015 in Ho Chi Minh City after the training phases and initiative implementation had been completed. Half of the ViLEADers participated in the workshop.

The objectives of the workshop were to review the impact of ViLEAD on the LGBT movement in Vietnam in the eyes of the community, to review the programme, including training, small initiatives and coaching progress and to provide feedback to the next year of ViLEAD. Through this review process, the workshop also sought to help ViLEADers to develop their evaluation skills.

### 7.1 Reviewing the impact of ViLEAD on the LGBT movement

The participants started with a full group discussion about the changes they had observed during the past year, most notably in the presence and visibility of the LGBT community and the scale of activities. The most visible changes included greater engagement of



community members in provinces where ViLEADers are based through outreach activities, more support from ViLEADers to strengthening the capacity of community members, and establishment of a network of leaders throughout the country.

The changes observed were limited to activities implemented by participants of the programme, and the improvement in capacity of the participants themselves. The impact was limited to the level of community outreach through online and offline channels, although one transgender participant reported having engaged in policy dialogue with government and development partners. Discussion did not include the overall changes in the LGBT movement during the past year and the role of ViLEADers in the movement.

▲ A transgender ViLEADER sharing stories advocating for the amended Civil Code recognising transgender people (May 2015).

### 7.2 Reviewing the implementation of the grants by ViLEADers

During this session, participants worked on their own or in a group of two if they had implemented the same activity. Participants were guided by the facilitator through a series of indicators:

- Number and scale of activity, methodology,
- Number of participants, attitude of participants and the media,
- The impact on community members and awareness of people where the activity took place.

Most of the initiatives were new and were started by ViLEAD, so evaluating the impact of the programme on initiatives was a challenge. Moreover, most participants paid more attention to describing the activities than pointing out the changes in the way they had organised the activities and how ViLEAD had contributed to the changes. However, ViLEADers did not take part in any other capacity-building programme so it is safe to assume that ViLEAD had changed how they advocated.



Activities that had taken place prior to the launch of ViLEAD were reported to benefit from the improvement in technical capacity and organisational capacity of ViLEADers. For instance, they undertook better planning before organising an outreach activity in high schools; they engaged the key influencers in their activities for greater impact; community meetings had more concrete topics with objectives to direct discussion rather than just sharing stories; and there was a sense of coalition among neighbouring provinces, notably in the Central Coastal Region and the Mekong Delta.

An important result that was apparent in most provinces was the emergence of key leaders in the community who were willing and motivated to lead. As ViLEADers had also learned to become a leader of their group throughout the programme, some were still struggling to share responsibilities and empower other members of their group, but some had begun to stay behind, inspire others and share the spotlight. A community is starting to develop in the provinces where it was once almost impossible to identify an organised group.

Along with these developments, there was also a need for further improvement of these activities. Social outreach events were limited by time constraints and as a result could not provide more comprehensive information and failed to keep track of participants for more follow-up activities. There was no systematic evaluation of previous activities to discuss shortfalls and revision of the plan. While groups started to form in other provinces besides Hanoi and Ho Chi Minh City, there was no clear responsibility for members in the group and no organisational structure among the core members.

### 7.3 Reviewing the training programme

Participants were divided into five groups to provide feedback on the following topics: concept, recruitment and selection, training programme phase 1, coaching methodology and training programme phase 2.

Participants agreed that there was a need for a capacity-building programme for community members as activities had been sporadic and not strategic. There had been a need to empower a leader at the provincial level. However, the conceptualising and planning process of ViLEAD had been closed to community members until the recruitment notice was announced, which made them feel they had been left out. Participants reported that they would like to take part in designing the programme with a more participatory approach.

There was also some feedback about the selection criteria, which focused heavily on geographic distribution, as perceived by participants. They suggested that selection criteria should be balanced, but at the same time, some criteria should be weighted more than others depending on the needs of the movement. For instance, transgender people should be prioritised in order to support and strengthen the transgender community.

Generally, participants were satisfied with the training workshops. They were practical, tailored to the need of the community and had innovative and comprehensible delivery. Some sessions such as risk management were introduced before they had any real experience of managing an event, thus they could not understand the materials wholly. This suggests that there is a need for a review of those courses after participants carried out their initiatives to ensure they knew how to use the skills. Such materials could also be repeated to the participants through the coaching process.

Participants also reported that ground rules should have been established at the beginning of each workshop to ensure privacy and respect to other participants, as well as the effectiveness of the training workshops. In between the sessions, they suggested that there should be more icebreaking activities to help them concentrate.

The coaching process had been useful to ViLEADers by providing a continuous learning platform for them. They were connected to each other and introduced to other capacity development opportunities. However, it was also noted that the support was not timely enough. The whole process was facilitated by one person, who was at times overloaded. There was no toolkit designed for coaching, and participants were not proactive in sharing their information. Additional support to the coaching staff should be provided, or more time should be allocated to coach ViLEADers. There should be more opportunities for ViLEADers to share their experience, probably through Skype or an online platform, a blog, etc.

The grant provided to support small initiatives was too small. Participants suggested making the initiatives more cost-effective.

▼ Meeting of ViLEADers to prepare for Viet Pride 2015 with activities carried out throughout Vietnam.



ViLEADers relied heavily on ICS as a mediator for conflicts among groups, and they also blamed ICS for not being able to solve their problems. This may cause problems in the future when they do not know how to negotiate and solve the problems arising among themselves, which may lead to infighting, decreasing morale and dissolution of groups. They also admitted (unhealthy) competition among groups and the failure to collaborate with each other. Partnership-building skills should be considered in the next phase. ViLEADers should be empowered to make their own decisions, probably through the coaching process.

## 8 Lesson learnt and discussion

The timing of participation was an important feature of ViLEAD. The programme was organised just as society began to raise awareness of LGBT issues, policy advocacy relating to LGBT rights was beginning, and local communities became more visible. Furthermore, organisers encouraged the participation of minorities and gender equity among the LGBT community, the participation of transgender men and women, lesbian and women allies. The training content was developed to be suitable and flexible to the range of ViLEADers who participated in the programme. Most of them had not participated in leadership training prior to their participation in ViLEAD. After each session, facilitators and ICS held reviews and discussion about how ViLEADers understood training content and whether there would be any adjustment in the following one. The methodology of sharing and learning from each other was effective.

Learning from doing is the philosophy of ViLEADers. With limited funding for initiatives implementation, ICS tried to give ViLEADers chances to implement their plans, which helped them develop leadership, organisational and technical capacities, and commitment to the movement. Coaching and initiatives implementation are crucial points in the leadership development of ViLEADers.

A key effect of the programme was that it led to changes in the way ViLEADers defined strategies for organising gatherings for meeting and sharing among LGBT individuals. This united them as a community, working together to change society in local areas through training sessions about SOGIE and LGBT rights, and public events to increase the visibility and show support to legal changes that increased protection of LGBT rights. ViLEADers actively built a network among themselves, supporting other groups at regional level.

ICS encouraged ViLEADers to be proactive in participating and building the programme. ViLEADers will engage in organising further ViLEAD programmes by giving consultation about recruitment, selection,

training programme, logistics and providing coaching to new ViLEADers.

Another aim of the programme was to develop ICS as a centre of excellence for building the capacity of other CSOs, and to facilitate networking and mainstreaming LGBT issues. ICS strengthened its own capacity to organise a programme with the participation and working combination of all staff. ICS developed skills of facilitating training phases, sensitising and monitoring issues of the community, being trusted among ViLEADers for coaching and sharing experiences of promoting the LGBT movement.

ICS and local groups raised awareness of understanding and supporting each other in activities to change positive social awareness, strengthening allies' networks and PFLAG, increasing visibility of LGBT people.

*I used to be afraid that the relationship between ICS and the community would be like a spider which had only one controlling headquarter and the legs all depended on it. But until now observing ICS activism, especially in ViLEAD and Viet Pride, I realise that the community empowerment philosophy of ICS is like a starfish, once a leg lost, the others remain (Participant in the 2014–15 ViLEAD programme).*

Local LGBT and allies groups should be engaged in leadership programme organisation, being coached and learning from their own activism. This gives ViLEAD deeper and larger impact in building solidarity and community empowerment, social change and advocacy.

*Participating in ViLEAD, I see that communities in the north, centre and south of Vietnam unite and in accord of promoting the movement in Vietnam. We have never been such a tight alliance like this.*

In conclusion, LGBT leadership programmes should provide not only technical capacities, but also spaces for leaders to contribute and learn from them. As the LGBT movement in Vietnam is still young, leaders should always be encouraged and coached to keep their enthusiasm and commitment to the community.

After ViLEAD, there have been more leadership development programmes with diverse target participants: a transgender leadership programme, PFLAG capacity building, and NextGEN, a programme to build core groups in nine local provinces are all being developed. Moreover, the ViLEAD programme is due to run again in 2016 with a newly recruited group of ViLEADers.

“LGBT leadership programmes should provide not only technical capacities, but also spaces for leaders to contribute and learn from them.”

# Human

NICOLAS SILVA AND KHOULOU MAHDHAOUI

These four photos are from the series 'Human' and were all taken in Tunisia. Through these pictures, we question gender identities and non-normative sexualities that are largely marginalised, and thus the pictures interrogate and challenge the place of women in Tunisian society. To better understand the scope of these images and their significance, we need to situate them in their wider context.

The Tunisian political context is changing. Since the so-called Revolution, four years ago, we have heard about the revolutionary process, then the transitional one, until we finally reached a new constitution and the first presidential elections. Despite these new progressive legal changes and a new minimal protection for private life in the constitution, protection for gender non-conforming individuals is still non-existent. In fact, we are still targeted by police and general society as a threat.

**Chouf** is a feminist organisation working on women's bodily and sexual rights in Tunisia. Chouf defines itself as a group of activists who rely on audiovisual material in their work. They have a multiplicity of objectives, but they all revolve around one necessity: allowing Tunisian women, and more specifically women who have sex with women, a safe environment in which they can express themselves freely and work on developing their potential. Chouf recognises that women are oppressed not only for their womanhood, but also for their sexual orientation that is regarded as a deviation from established social norms. See Chouf Minorities (<http://chouf-minorities.org>).

Before the Arab Spring, the media in Tunisia was limited. All media outlets were controlled directly or implicitly by the *ancien régime*. After the fall of the regime, more than 100 newspapers were established, along with numerous television and radio stations. This diversity of media led to a kind of media chaos. After years of oppression, many people asked for, and took, a space to express themselves. Now that the excitement of this period has passed, there remain many more media outlets than before the 2011 uprising. However, the majority of these are still headed by men. Moreover, all these organisations belong to different lobbies and support interests that do not match those of our organisation, Chouf. *Male domination in this field remains absolute.* This domination means that there is very limited space to express views that challenge entrenched stereotypes of gender and sexuality. To create a space for alternative expression, it was necessary to create an alternative media space. And vice versa.



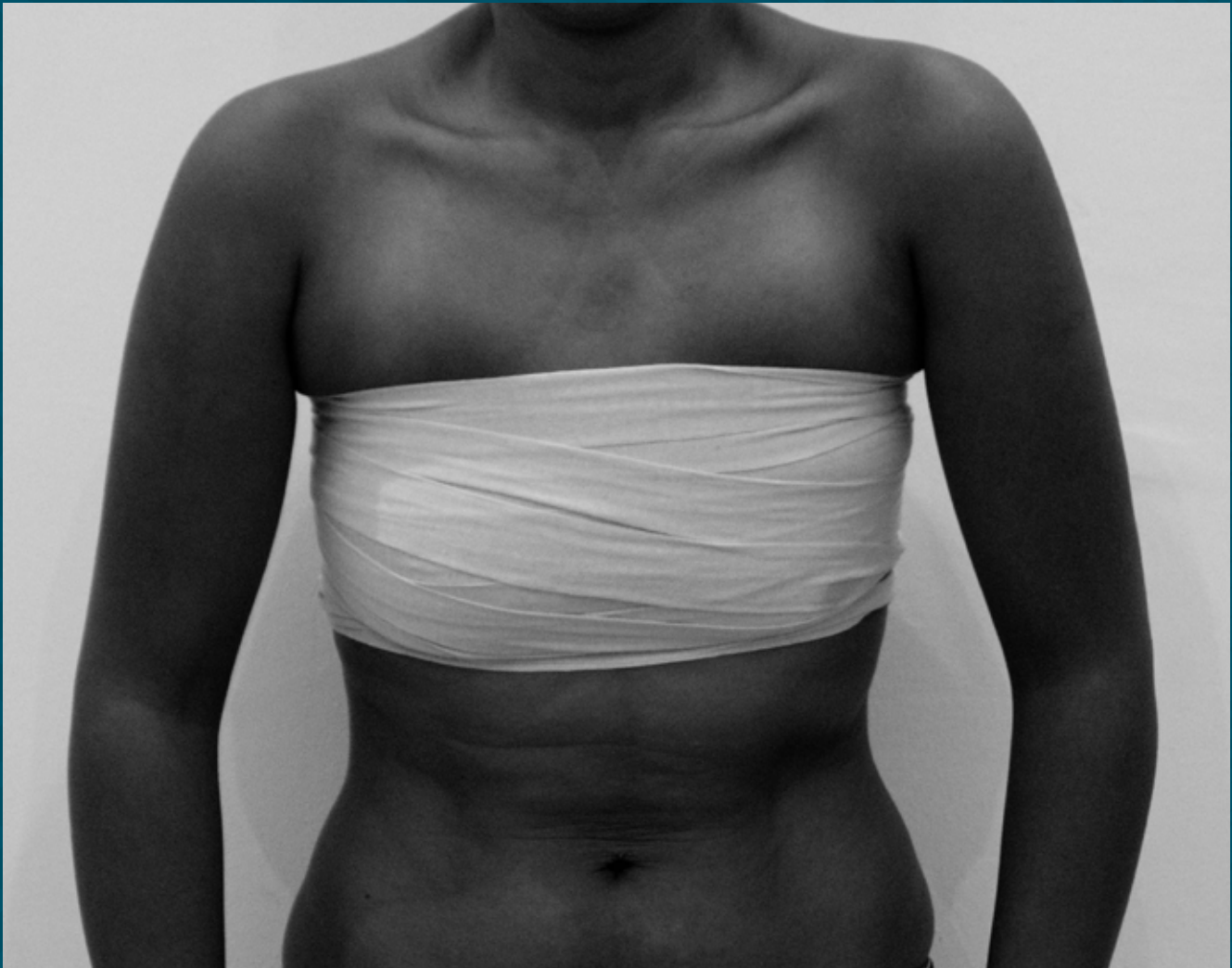
▲ Person standing in a corridor. This photo is part of a collection that aims to disrupt and question normative gender roles.





◀ The text on the body translates to 'male' in Arabic.





▲ Through visual imagery, as in this photo, Chouf seeks to disrupt and question normative gender roles and sexualities.

Chouf is a feminist lesbian, bisexual and transgender (LBT) organisation working on bodily and sexual rights of women. Chouf fights discrimination against women and offers a safe space for gender non-conforming persons and those with non-normative sexualities, through the use of audio and visual media. We have grown from the idea that it was essential for us to find and inhabit a new and challenging space of expression. Despite the apparent abundance of

media spaces, Tunisian media continue to reproduce the same heteronormative and patriarchal patterns of domination. It is from this perspective that we

“The more we share /talk, the more we are able to show in this alternative space, the more people will hear or see, and hopefully the more they will listen and look.”

decided to use journalistic and audio-visual knowledge and tools to create this new safer media space of expression and artistic and political development. We chose this strategy because the law criminalises practices such as same sex activity or gender non-conforming behaviour but not the representation or analysis of these practices. The more



we share/talk, the more we are able to show in this alternative space, the more people will hear or see, and hopefully the more they will listen and look.

It is this kind of initiative that gave birth to the first edition of Chouftouhonna (It's Their Vision) on 17 May 2015 on the occasion of the International Day Against Homophobia and Transphobia (IDAHOT). Chouftouhonna was the first feminist art festival in the Arab-speaking space and the Middle East and North Africa region. Based on a feminist approach and aiming to give a new space for creativity but also accessibility to art for women, the festival had more than 70 participants and more than 300 entrants. As a first edition, it was

a real success. Particularly gratifying was the way in which the audience and several media outlets that play a large role in shaping public opinion gave really good feedback about the festival, as did the artists who participated.

Chouftouhonna is the concrete example of the creation of a new space of expression for gender non-conforming persons and the opening out of these spaces to a wider audience. It is participating in an inclusive process that will hopefully stop the marginalisation of persons with non-normative sexualities and identities in a near future. Through the festival, we took a step, moving from a little group to a community, and more and more our voices will be heard by society.

▲ 'The dawn'.  
A person sits in  
a doorway.

# The Role of Technology for Legal Empowerment in India

FRANCESCA FERUGLIO

**Francesca Feruglio** is a human rights researcher and activist with a focus on socioeconomic rights and legal empowerment. In 2011 she co-founded Nazdeek, a legal capacity-building organisation based in New Delhi with a mission to bring access to justice closer to marginalised communities. Currently Francesca is also a Research Officer in the Health and Nutrition Cluster at the Institute of Development Studies (IDS). She has a Master of Laws (LLM) in International Human Rights Law from the Irish Centre for Human Rights, and a bachelor's degree in History of Cultures, Padua University, Italy.

The article reflects on the role of information and communications technology (ICT) in legal empowerment programmes. It stems from Nazdeek's work to advance reproductive rights and demand accountability in the delivery of maternal and infant health-care services in Assam (north-east India). Nazdeek is a capacity-building organisation that works with communities, activists and lawyers to seek justice for economic, social and cultural rights violations in India. Nazdeek works within the framework of legal empowerment (LE), fusing human rights training with public interest litigation and advocacy at local and national level to demand accountability in the delivery of essential services, including maternal and infant health care, housing and food. This focus on accountability results in few overlaps with strategies used in social accountability (SA), such as the use of ICT.

Indeed, there are many overlaps between LE and SA, and it has been argued that the two areas should blend (Maru 2010). Some of the limits identified in ongoing social accountability efforts could be addressed by legal empowerment strategies, and vice versa. For instance, SA has effectively dealt with issues of access to resources and service delivery (including reproductive health care); however, it does not pursue 'remedies from the broader institutional landscape' (Maru 2010). Conversely, while LE seeks to

ensure people have access to remedies (both judicial and non-judicial), it has been focusing more on civil and political rights because that is perceived to be the 'classic' area of focus of legal aid programmes that LE has developed from. Therefore, its potential to address structural discrimination in access to services has remained untapped.

Technology is undoubtedly a tool increasingly utilised in the SA sector that could be highly beneficial to legal empowerment programmes advancing socioeconomic rights. Tackling issues of service delivery often requires gathering and managing large amounts of data that often need to be coded and analysed.

## 1 The 'End Maternal Mortality Now' experience: from mere data collection to legal empowerment through ICT

In April 2014, Nazdeek in partnership with the International Center for Advocates Against Discrimination (ICAAD)<sup>1</sup> and Promotion, Advancement, Justice and Human Rights of Adivasi (PAJHRA),<sup>2</sup> launched the pilot project End Maternal Mortality Now (EndMMNow), a community reporting platform to document gaps in the delivery of health care in rural Assam.

Over 250,000 families live in Assam's tea gardens, mostly Adivasi (indigenous people) and lower castes, fourth-generation descendants of immigrants brought by the colonial planters from India's central states more than 150 years ago. Tea garden workers in Assam lack access to services and facilities, in contravention of India's Constitution, India's domestic laws such as the Plantation Labour Act (1951) and the Assam Plantation Labour Rules (2010), the National Food Security Bill (2013) and India's national schemes such as the National Health Mission. Women constitute more than 50 per cent of the tea garden workforce.

Violations of the rights to health, food, life and equality are largely unreported and, as a result, remain unaddressed. Basic tools to communicate, inform and document violations are virtually non-existent, and women lack access to mechanisms to hold public and private entities accountable for the failure to provide life-saving treatment as required by law. At a more nuanced level, women have poor relationships with health authorities in their block and district, thereby further hindering access to health services.

▼ Ward of a tea garden hospital in Sonitpur District, Assam. Many tea garden hospitals rest in highly unhygienic and inadequate conditions.





The government does not track information on the availability of health services, and as a consequence communities and local advocates lack solid data to support demands in advancing women's health.

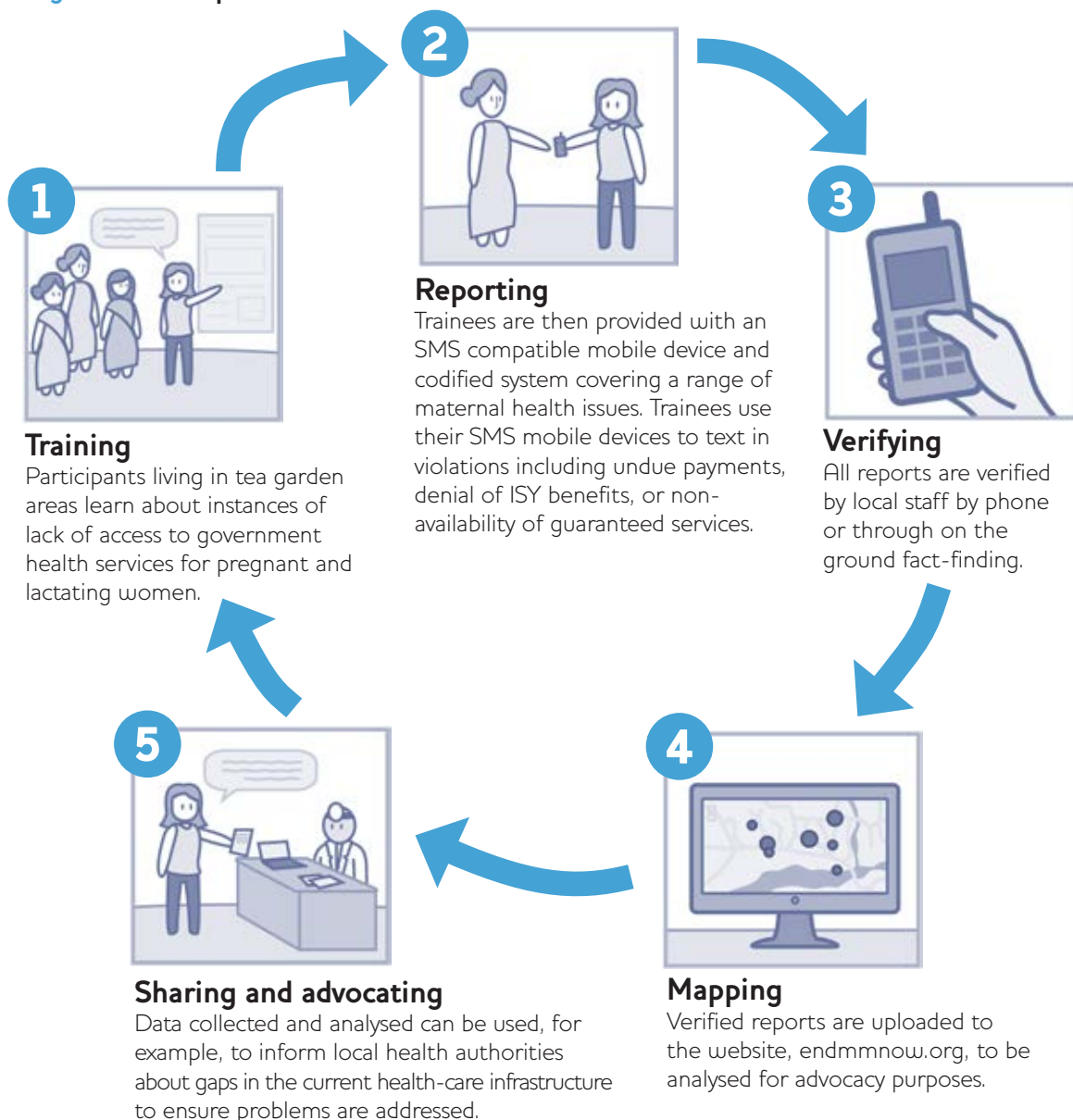
Using the concept of 'crowdsourcing', EndMMNow allows volunteers to report incidents through coded SMS messages. The coding system covers violations of benefits that women are entitled to under public health schemes, such as lack of free ambulance service, undue payments (informal fees for medical services that should be provided free of cost), inadequacy of health facilities (e.g. no electricity, water or toilets) and lack of medical staff. Codes cover over 30 types of violations and approximately 20 different health facilities. The veracity of information received is verified by phone or through field visits. Reports are mapped

on a website<sup>3</sup> and periodically analysed and submitted to government authorities. This process is shown in Figure 1.

To date, about 40 Adivasi women have joined the programme, which includes a series of training sessions on maternal and infant health, and rights and entitlements under domestic law and government schemes. A report highlighting the main findings and recommendations has been published and submitted to the District authorities in February 2015 (Nazdeek, PAJHRA and ICAAD 2015).

“Violations of the rights to health, food, life and equality are largely unreported and, as a result, remain unaddressed.”

**Figure 1** The steps of EndMMNow



Source: Nazdeek, PAJHRA and ICAAD (2015). Infographics by Joe Wheeler.

## 2 What we found

In its pilot stage, the technology led to the mapping of over 70 cases of violations that have been mapped and disaggregated by facility, block and issue. This allowed for a nuanced understanding of failures in health-care delivery and enabled the development of recommendations to improve access to health services at facility, block and district level.<sup>4</sup>

Data have been disaggregated and analysed following the 'three-delay model,' widely used by the United Nations (UNFPA 2014), non-governmental organisations such as Save the Children (2013) and academics (see, e.g. Waiswa *et al.* 2010) to understand the causes of maternal and infant deaths (Maine 1991).

The model attributes the vast majority of maternal deaths to three types of delays: (1) deciding to seek care, (2) reaching a health facility, and (3) obtaining care.

For instance, factors identified to contribute to delay number 1 are: payment of bribes (reported in half of the cases), poor hygiene and overcrowding, discriminatory treatment and poor rights awareness. The main factors leading to delay number 2 are unavailability of ambulances (28 per cent of total cases) and inefficient referral system (45 per cent of stillbirth cases and 50 per cent of maternal death cases). For the delay in receiving care (number 3), reports received mainly relate to unavailability of blood, undue payments, lack of medical care and poor health infrastructure. Qualitative data and field research exposed deeper issues related to the lack

of transparency in management of funds and poor grievance redressal mechanisms.

Recommendations have also been developed following the three-delay framework. Additionally, data disaggregated per facility allowed tailoring recommendations per facility, which makes them much more 'actionable' (see Figure 2).

## 3 What the project led to

Besides providing actual data for civil society to feed into ongoing advocacy and litigation, the programme led to a number of tangible and non-tangible outcomes, described here in chronological order:

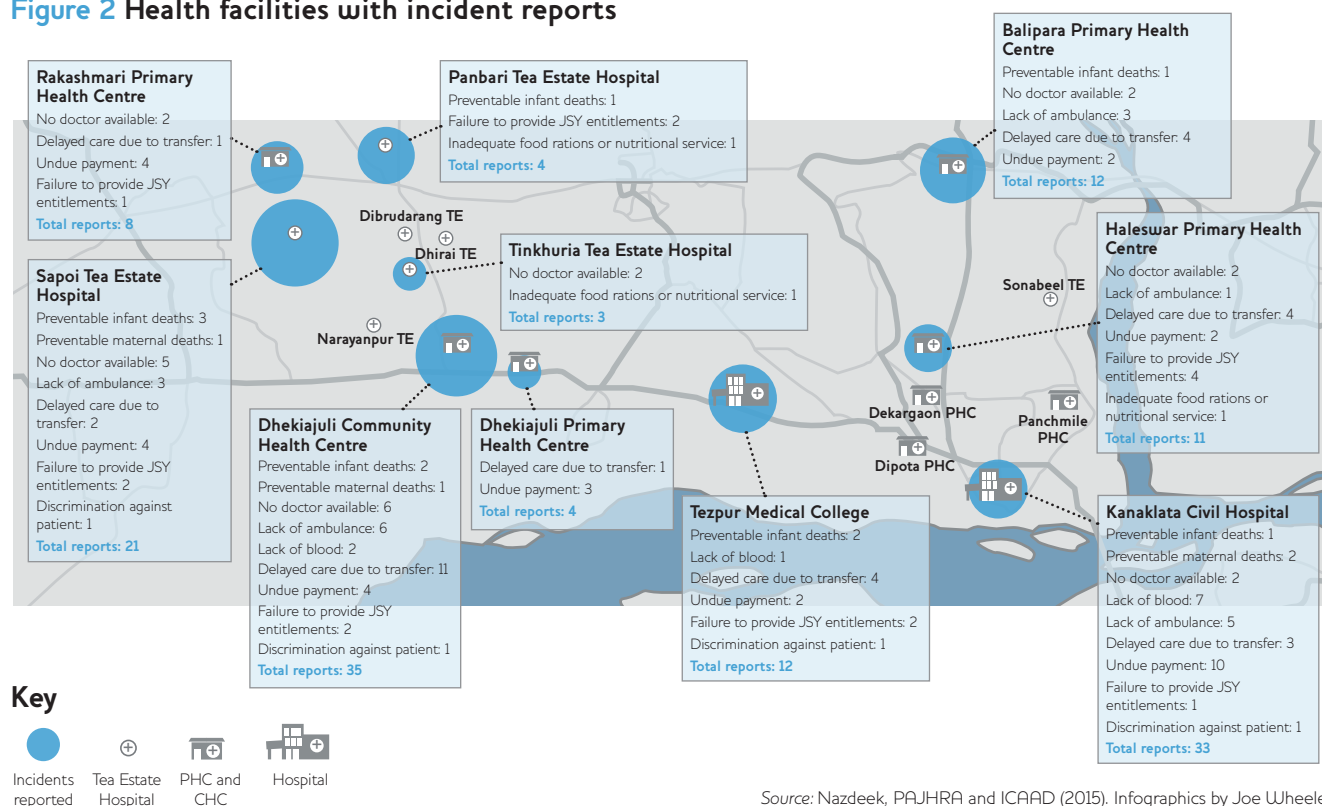
### 3.1 Impact on women's awareness of their rights

An immediate outcome of the project was the increased awareness on maternal and infant health rights, including knowledge of government schemes and policies mandating basic health-care standards for pregnant and lactating women and children. During the workshops held, participants demonstrated a clear shift towards a rights-based perspective: issues that so far had been seen as a fatality, such as lack of health services in government hospitals, are now labelled as violations of women's rights and entitlements under the law.

### 3.2 Impact on women's capacity to seek justice

Increased awareness led to increased confidence to act for demanding better service delivery. Once volunteers learnt about the maternal and infant health services they were entitled to, they began to challenge

**Figure 2 Health facilities with incident reports**



Source: Nazdeek, PAJHRA and ICAAD (2015). Infographics by Joe Wheeler.

the status quo, questioning the lack of availability of services (especially ambulances) in their villages and tea gardens for frontline workers and health staff.

A second series of trainings provided tools and capacity for conducting fact-finding and documentation and filing formal complaints with relevant government departments.

### 3.3 Improvement in access to health care

Initially, participants observed that the mere fact of reporting incidents led to immediate improvements in the quality of treatment received at public hospitals, and in the maintenance of records by frontline health workers (for instance, earlier registration of pregnancies that ensures women have access to nutritional supplements and check-ups).

At a later stage, the filing of complaints and pressure on local authorities led to better delivery of food rations, better functioning of Anganwadi Centres (local centres providing food and health services), reduced waiting time for ambulances and appointment of a doctor and a social health worker in the project area.

### 3.4 Strengthening of grievance redressal mechanisms

To ensure women have effective channels for autonomously addressing maternal health violations, the project sought the establishment of Citizens Grievance Forums. The need to establish an effective grievance redressal system was suggested by data collection and field research. A first attempt to close this gap occurred when some of the volunteers submitted the final report to district-level authorities (see *The Hindu* 2015; Nazdeek 2015). One of the report's key recommendations concerned the establishment of a system for volunteers to regularly meet with local health authorities to address the cases of violations reported through SMSs. In that circumstance, authorities committed to holding Citizens Grievance Forums every three months, and to take time-bound actions to address the issues reported through SMSs.

### 3.5 Impact on the ability of local activists and lawyers to address large-scale issues

Thanks to the platform, civil society in Assam can rely on solid data to develop advocacy strategies to curb the appalling number of maternal deaths among Adivasi women. For instance, earlier in 2014, Nazdeek assisted in filing a litigation at the Guwahati High Court regarding the preventable maternal death of a woman due to lack of timely access to blood. The data collected through EndMMNow is instrumental in proving the scale of the issue in the district and in calling for another blood bank to be made functional. Moreover, the project established a mechanism to systematically track maternal health violations through community reporting.



## 4 Some lessons

During the pilot phase of the project, we have observed a number of lessons that can be useful to keep in mind when planning ICT interventions in comparable contexts:

### 4.1 The 'inside story' on community engagement and participation

#### *Community reporting is not a mere data collection exercise*

It has spill-over effects on the people reporting, first of all in the *increase in rights awareness and the motivation and ability to 'act'*. In the first year of the pilot project, we sought the collaboration of local activists and community leaders to design and coordinate the project. We soon witnessed how a 'mere' data collection project, designed to fill an information gap and be a tool for civil society to systematically collect data, turned into a community-based platform. Indeed, it quickly emerged that some participants were eager to go a step ahead: address the issues reported.

This also led to the issue of *reporters' expectations*. The motivation to actively participate in the project (by reporting) is directly linked with the faith the reporting will lead to some positive change. Managing expectations had to be balanced with resources and capacity available to grass-roots activists. Not only would it have been impossible for local NGOs to document and follow up on all cases reported, but more importantly it would not have been a truly empowering process. So we decided to run additional trainings on documentation and fact-finding and complaint drafting. This way, community members would have been much less dependent on local NGOs to address issues.

Finally, significant inconsistencies in the number of texts sent by participants prompted us to unpack what affects women's reporting. Disaggregating reporters by age, religion, literacy level, occupation and location showed how their *access to technology can reproduce inequalities existing within the community*.

▲ Community members discuss about delivery of maternal health services during a community meeting organised under the EndMMNow project in Sonitpur District, Assam.



Women with higher social status within the community, or their families (whether perceived or not), sent more texts and were more likely to approach government workers to demand delivery of services. In other words, *access to technology did not automatically lead to reporting*. Other factors drive the ability of women to speak up: self-confidence and supporting social and family ties to name a few.

#### **Using technology in a low-tech environment**

Another set of considerations can be made around the use of technology in low-resourced environments. Marginalisation and social exclusion surrounding – and very often causing – socioeconomic rights violations result in barriers such as low-technology environments, geographic isolation, and low literacy and rights awareness. This makes it difficult to ensure that rights-holders participate meaningfully and maintain ownership over the data. It also leads to more practical challenges, such as ensuring outreach to remote areas and reduced potential in using technology for data collection.

*Working in a low-tech environment requires low-tech (or 'no-tech') solutions.* The technology solution designed must be relevant to context and users. Relevance of technology is essential to ensure local ownership, therefore affecting participation and impact of the project.<sup>5</sup> For instance, there would not be much point

handing over smartphones to women who cannot read. In addition, people who are not familiar with technology need face-to-face interaction to gain the confidence and ease in using even something as basic as SMS. In our experience, the more personal interaction we had with participants, the more reporting increased.

*Using technology does not necessarily entail fewer human resources.* While technology

offers cost-effective solutions, producing data may add workload to (often) already under-resourced grass-roots activists and NGOs. This is not only true when the data need to be analysed and used for advocacy purposes, but also at an earlier stage, when the system is being set up locally. Additionally, as described above, community engagement is resource- and time-demanding, yet it is also what ensures long-term change.

#### **Technology as a change enabler, not a solution**

Reporting triggers improvements, but it is not enough to achieve sustained change. So technology alone will not succeed. While information gathering is a change enabler, since it creates awareness among people, other factors should be considered to ensure sustained change:

(a) *People should have the means to use the information.* This requires: (1) the information to be 'actionable'. Data are not information; they need to be disaggregated, analysed and presented. In this case, disaggregating findings by facility and/or block has been essential to craft concrete and actionable recommendations; and (2) additional effort to build capacity of people to use the information collected. In a legal empowerment programme, rights-holders would be the ones using the information to demand their rights, but alternatively the process can be led by local activists and/or community leaders.

(b) *A tiered advocacy strategy seeking structural changes.* Frontline health workers are sensitive to citizens reporting, primarily because they are afraid of being held accountable. Yet, since the responsibility for the failure to provide timely services lies only in small part with frontline workers, and largely with higher-level authorities, the pressure must be placed also at higher levels of the administration. In the EndMMNow project, the information collected through SMS has been used to advocate at facility, block and district level. In the next phase it will be important to coordinate efforts and maintain pressure at all levels.

## **5 Conclusion**

ICT offers valuable solutions both to address individual cases and to gather and manage large amounts of data and address systemic issues. Technology can be a change enabler, facilitating community mobilisation and rights awareness.

Legal empowerment should take the opportunity offered by ICT to tackle issues that have so far remained in the realm of social accountability but need to be addressed through a human rights framework. These include access to reproductive health care for marginalised communities and individuals. At the same time, the ICT sector could borrow the LE approach of working with users/beneficiaries to make programmes more effective and sustainable. Critiques have been inclined to be too quick to see technology as a panacea to fix any problem.<sup>6</sup> However, as demonstrated, access to technology alone is not sufficient to obtain long-lasting change. Additionally, community mobilisation through technology, if unplanned, can reproduce inequalities existing within the community. Other, 'no-tech', factors drive the process; first of all the capacity of people to take steps to address fundamental rights violations.

For this reason, the use of technology should be part of a larger strategy and coupled with other efforts, such as litigation and advocacy. Community members need to participate from the planning stages to ensure technology solutions are relevant and do not promote ongoing marginalisation and exclusion. And most likely, the lower the technology level of the context

**“Technology should be part of a larger strategy and coupled with other efforts, such as litigation and advocacy.”**



◀ A worker in Assam. Workers are required to pluck 24kg of tea leaves per day, facing cuts to their already meagre wage (Rs.115, £1.14) if they don't comply.

at stake, the higher the ground-level engagement required to ensure people make meaningful use of it.

Overall though, more research is needed to understand the potential for ICT in advancing human rights and countering marginalisation of groups and individuals. A welcome effort in this sense is an ongoing study led by Columbia University assessing the added value of ICT for social accountability and legal empowerment, with a focus on maternal health rights.

In the meantime, the next phase of the EndMMNow project will focus on consolidating the improvements made so far. In particular, reporters will test the efficacy of the Community Grievance Forums to address cases of violations. Simultaneously, local groups, including Nazdeek, will continue using the data collected for advocacy at block and district level and High Court litigation. The approach followed consists of reducing the role of non-governmental organisations in favour of community-led efforts. The goal is for the reporting platform to become an effective tool for Adivasi women to autonomously claim control over their reproductive rights.

#### Endnotes

<sup>1</sup> [www.icaadglobal.org](http://www.icaadglobal.org).

<sup>2</sup> [www.pajhra.org](http://www.pajhra.org).

<sup>3</sup> See [www.endmmnow.org](http://www.endmmnow.org).

<sup>4</sup> Key recommendations include: improve availability of blood transfusions; ensure better ambulance coverage in rural areas, for instance by increasing the number of ambulances or consider introducing other forms of transportation; establish an accessible and transparent grievance mechanism; and tighten monitoring of health funding allocation in tea gardens (Nazdeek, PAJHRA and ICAAD 2015: 47–50).

<sup>5</sup> The Responsible Data Forum on Human Rights and Documentation is leading an important online discussion on considerations to be made before introducing new technology to a low technology environment:

[https://wiki.responsibledata.io/Working\\_Group\\_on\\_Low\\_Tech\\_Environments](https://wiki.responsibledata.io/Working_Group_on_Low_Tech_Environments) (accessed 12 October 2015). The aim is to develop a guideline for funders, practitioners, and activists.

<sup>6</sup> See some of IDS' work on the issue at [www.ids.ac.uk/team/digital](http://www.ids.ac.uk/team/digital).

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# How Activism and Research Can Work Together: Reflections from the Philippines

**GYKY TANGENTE (EDITED BY ANNE LIM AND LYNX HUFANCIA)**

My name is Gyky Tangente and I am currently the Advocacy Officer of GALANG Philippines. The Filipino word *galang* means respect. We chose this name for our organisation because we believe that respect for diversity and equality is at the core of the struggle for lesbian, gay, bisexual and transgender (LGBT) rights. This is also a value that we try to embody as

we work with lesbians, bisexual women and trans men (LBTs) living in urban poor communities. GALANG's work is organised under four programme components that seek to contribute to the attainment of social and economic equity for Filipino LBTs. These are capacity building, policy advocacy and networking, research, and institutional development and sustainability.

Under our research programme component, GALANG collaborated with the Sexuality and Development programme of the Institute of Development Studies (IDS) to produce our 2013 Evidence Report entitled *Policy Audit: Social Protection Policies and Urban Poor LBTs in the Philippines* and our 2015 Evidence Report entitled *How Filipino LBTs Cope with Economic Disadvantage*. We consider these reports as GALANG's modest contributions to the promotion of evidence-based advocacy for LBT rights in the Philippines.

GALANG's policy audit reviewed several social protection policies affecting Filipino LBTs and their loved ones. These were the Social Security Act of 1997, the National Health Insurance Act of 1995, the Urban

Development and Housing Act of 1992, the Solo Parents' Welfare Act, the Philippine Government Service Insurance System Act of 1997, the Home Development Mutual Fund Law of 2009, and the Family Code of the Philippines. In our audit, we found that social protection policies that are designed precisely to protect Filipinos in cases of unexpected life events, such as unemployment, disability or death in the family, do not protect everyone equally because these policies favour heteronormative notions of what

a family is – that is, the way the laws are either written or implemented is biased in favour of family relations defined by blood or marriage. Since Philippine law does not allow or recognise marriage between persons of the same sex, these policies do not extend the same protection to same-sex partners and their families of choice. The policy audit results of GALANG were presented in Manila in May 2014 when we organised the forum on Policy Audits for Inclusive Development (PAfID) with the kind support of the Mama Cash Fund for Women and IDS. The forum also featured the results of evidence reports from South Africa, China, India and Brazil, which also tackled how selected poverty-reduction policies in these countries tend to be heteronormative and exclusionary.

The forum was attended by distinguished representatives from various Philippine government agencies, including policymakers, intergovernmental organisations, fellow advocates, academic institutions, non-governmental organisations (NGOs) and grass-roots LGBT organisations. Through GALANG's policy audit and the PAfID forum, we were able to not only make policymakers see that these issues are important but also remind them to commit to take action on such issues. They also had a chance to listen to lessons and best practices from other countries with respect to the need for inclusive poverty-reduction strategies. In the Philippines, LGBT issues are rarely discussed in formal spaces and, by organising PAfID, we believe that GALANG, with Mama Cash and IDS support, was able to give the participants a critical push in rethinking their views about the role of sexuality in poverty alleviation. In addition, our evidence reports have helped us in our engagements with the Philippine Department of Social Welfare and Development and the Philippine Commission on Human Rights, particularly those that look at social protection policies and poverty reduction. The policy audit results have also helped us immensely in raising public consciousness on discrimination that can significantly help the passage of anti-discrimination ordinances, and a national anti-discrimination law.

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## Mary Gyknell 'Gyky' Tangente

is the Advocacy Officer of GALANG Philippines, and facilitates the organisation's engagement with local and national bodies to bring into mainstream consciousness the pressing issues and concerns of lesbians, bisexual women and trans men living in urban poor communities. After completing her bachelor's degree in Social Sciences from the University of the Philippines Baguio, Gyky joined GALANG as a Community Organiser. This position provided her with critical insights on ground-level realities that fuel her passion to tirelessly advocate for equality, diversity and lesbian, gay, bisexual and transgender (LGBT) rights.



# SOLIDARITY

## What's Language Got to Do with It? A Reflection

CHLOÉ VAAST

The two-day symposium on Sexuality and Social Justice: What's Law Got to Do with It? gave me the opportunity not only to listen and take plenty of notes, but also to pick the brains of highly experienced and knowledgeable international activists, lawyers and researchers.

It's no secret that since 2011 LGBT rights have become a prominent issue within the development agenda as the Report of the UN High Commissioner of Human Rights endorsed for the first time the rights of lesbian, gay, bisexual and transgender (LGBT) people (UNHRC 2011). Within the same year, US (see Clinton 2011; Obama 2011) and EU political figures (European Parliament Intergroup on LGBT Rights 2011) as well as development institutions (Sutherland 2011) were talking about the violence and discrimination that 'sexual minorities' faced in the world. More importantly, foreign policies generally began seeking ways to ensure the promotion of human rights for all. As a reaction, there was an increase in funding to support work on sexuality as well as the threat of aid conditionality, which were both discussed at great length throughout the symposium panels. In this case, 'aid conditionality' refers to actions such as the announcement in 2011 by the British prime minister, David Cameron, regarding the withholding of development aid to African countries on the basis of poor implementation of LGBT rights (Kretz 2013; Press Association 2011).

We could perhaps call this a bias; I am no lawyer, but rather a researcher who tends to focus on social development – so I might have been more sensitive to picking up the tensions around language and representation, rather than litigation. On the last day of the symposium, during the final session, we were asked to split into smaller groups. Each participant chose a group according to their own estimation of their role within the sexuality and social justice framework: participants were asked to choose between 'researcher', 'lawyer', 'activist' or 'funder'. I chose to join the 'researcher' group, and like most I grappled with the two questions posed, 'what am I going to do?' and 'what do we need to

do?' For me, this led to questions about the subversive use of language in the LGBT rights movement and in my own work.

### 1 Subversive language

Not one, not two, but nearly all sessions at some point or another discussed the umbrella term 'LGBT' and occasionally the 'I' (intersex) and the 'Q' (questioning or queer) were added to the list. Many of us discussed the need to unpack the commonly used and sometimes practical terms, which cannot reflect the diversity of lived experiences as well as alternative definitions. More importantly, it highlighted that we need to pay attention to the differences within and between these categories, specifically referring to the weight of the 'T' (transgender) within this umbrella and addressing specific challenges they face in their everyday life.

As I reflected on the language of sexuality (and its hierarchy) throughout the conference, the 'LGBT' often really just stands for the 'G', sometimes the 'L', we can forget the 'B' and we clearly don't fully understand the needs of 'T' and rarely do we think to include the 'I' in the mix. I was surprised by how little the term sexual

orientation and gender identity (SOGI) was employed during the symposium. SOGI emerged in 2007 since the Yogyakarta Principles call for action worldwide against discrimination and abuse (International Commission of Jurists 2007). The acronym SOGI might not have the same ring or the same political history as LGBT, but it certainly has been gaining momentum and popularity, I think due to its 'queering' possibilities.

What I mean by 'queer' is first as a self-affirming umbrella term referring to all sexual and gender diversity and second how some people use 'queer' to problematise the idea of labels and categories. Prior to the 1990s, the term 'queer' was often used as an insult towards people of non-conforming sexualities and genders; the reclamation of this term was sparked through

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“Many of us discussed the need to unpack the commonly used and sometimes practical terms, which cannot reflect the diversity of lived experiences.”



activist groups and academic communities (Namaste 1999). However, the reclaimed word can still be considered offensive to some, and thus it remains problematic in terms of integrating it in the lexicon of international development. Yet the potential for queering international development remains, and perhaps requires further exploration.

## 2 Subversive language and research

I often ponder on how to show more solidarity for the global spectrum of the sexual orientations and gender identities. What is the appropriate language to use? Is it LGBT, MSM (men who have sex with men) or WSUW

(women who have sex with women)? And the list of acronyms seems to be infinite. Does a term like 'same-sex' better represent SOGI issues, because it encompasses individuals who do identify with existing labels as well as those who don't, even if their sexual behaviour is considered homosexual? What about the term 'sexual minorities'? It seems to be used similarly to 'ethnic minorities', as the intention is to highlight the violation of human rights and lack of protection from discrimination.

I find that we often lack reflection of whom we are categorising and on what basis. Are these prescribed terms portraying a community for development interventions purposes? Do these labels reflect lived experiences or behaviours? Are these terms SOGI or LGBT only really used by those working

in the field? What this really means is that there is a lack of control over the language of self-representation as well as the ability to describe one's narratives. More importantly there is a lack of space to talk and listen to those rendered invisible by these labels. The recurring discussions around the language of sexuality and our limited understandings highlight the challenges of improving local needs.

Historically, researchers have been considered 'experts' in their field of study and thus set out to find objective truths. These epistemological and ontological values have been criticised at length by feminist theorists who brought into question researchers' positions of power and the responsibilities they have towards research participants. As I am a recent graduate and thus relatively new to the field I have had experiences working as a consultant on various projects addressing issues of sexual orientation and gender identity within a development framework. Feminist approaches to research have informed my studies and the way I carry out the research I work on. As was obvious in the symposium, there are no simple, quick-fix answers to issues regarding language and representation in the

context of sexuality and development. Spaces where these issues can be discussed are a step in the right direction. Listening to the discussion panels and talking with presenters and attendees has impacted how I wish to plan future research: deeper consideration of the position of the researcher and the politics of language can add nuance to the conduct of interviews with professionals in the field and can inform interactions with LGBT activists. For the time being, as my work mostly consists of writing reports, I intend to consider these language dynamics whenever possible.

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“Deeper consideration of the position of the researcher and the politics of language can add nuance to the conduct of interviews with professionals in the field and can inform interactions with LGBT activists.”



# SOLIDARITY

## Differentiating Transgenderism from Homosexuality: Strategies and Synergies

AUDREY MBUGUA

Twelve years ago, I made the courageous step of transitioning from the male to the female sex. I call it courageous because in the society that I live in it was a taboo for a boy to plait his hair. My first step was plaiting my hair and as expected, my dad went berserk. 'What is wrong with you? I want that hair shaved tomorrow in the morning!!! Okay?' I looked at him and with my voice shaking told him I would not shave it. He declared that I was no longer his child and he would not pay my university tuition or pocket money. This marked the beginning of a cold war between my parents and me that lasted for two weeks. At the height of the cold war, my mother called me into her bedroom and accused me of homosexuality. The stereotype in our village is that a man or boy who plaits his hair is requesting fellow men to sodomise him. Time was running out to enrol at university so I capitulated and had my hair shaved. I was stressed and broken by this and I wish that I had been able to talk to them about what was going on inside me. I isolated myself from my friends so that they would not think of me as a homosexual because of the plaited hair. I just wished I was dead.

After a year in school, I could not hold the woman in me back any more and I restarted my transition. I endured numerous taunts and insults from some students and subordinate staff in the university. I endured the nasty comments my relatives made and kept myself busy with university work and farming. Three years later, I went out to look for internships and it was like jumping from the cooking pan into the fire. I would hand my papers to human resource officers in the research institutes I went into and they would hand them back to me. The reason? They assumed that I had mixed them up with someone else's papers. My dean's letter of recommendation, academic transcripts and identity card showed my name was Andrew Mbugua and none of the

human resource departments could understand how I was Andrew. In fact, most had threatened to have me detained so that I could explain why I was using someone else's papers to seek an internship. I tried explaining the concept of transgenderism but in most cases it fell on deaf ears. I don't know where I got the strength to endure all those numerous humiliations but I think I knew I was meant to be a research scientist in the fields of virology and bio-informatics. Eventually, I got a position in a molecular biology laboratory owned by the Government of Kenya. It was a huge achievement for me but it took the keen ear of the head of the lab – Dr Malinga – to understand what was going on. With Dr Malinga's help, I became an intern and was soon playing around with DNA and viruses in the lab.

Word spread in the lab that I was a 'guy' and that I was a *shoga* (gay man) from Mombasa. When a storm destroyed hectares of wheat crop, the local farmers blamed it on me. Months later I lost the position and I went back home. By now, my parents had immigrated and I was living alone. I started looking for jobs but everywhere I went there were those issues of my academic documents and national identity card not reflecting the person I was.

I remember late in 2008 I attended a job interview with a local bank. A day later I met with an uncle of mine who works with the same bank and he told me the human resource department said they would not employ someone like me. He criticised me for blowing it and it just tore me apart. Things moved from bad to worse. What was the point of living when I saw the depth to which I had fallen? I could not even put food on the table. My relatives were embarrassed by me and did not want to be associated with me. My parents did not want to hear from me because they thought I was a loser.

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◀ Audrey Mbugua presenting at the Institute of Development Studies 'Sexuality and Social Justice' Symposium, Brighton 2015.



“There were no projects to address the needs of transgender people and we were required to fit into either lesbian women activities or men who have sex with men (MSM) projects.”

I did numerous interviews and all the institutions promised to get back after a few days but never did. My county hospital referred me to Mathare Hospital which is Kenya's leading mental health referral hospital. I was treated for severe depression and officially started my gender-reassignment therapy. I was optimistic about getting my hormones and surgery and the anti-depressants were nothing short of a miracle. I got a new lease of life and through persistence I

found a volunteer position in a health non-governmental organisation (NGO) in Nairobi.

Later on, I was introduced to the gay movement in Kenya. This consisted of NGOs that claimed to work for lesbian, gay, bisexual, transgender and intersex (LGBTI) persons. I tried to fit in these NGOs but I found them very inappropriate for transgender people. There were no projects to address the needs of transgender people and we were required to fit into either lesbian women activities or men who have sex with men (MSM) projects. I

would always ask the gay activists in these organisations when they would initiate projects for transgender people and they would always say that they needed to work on their priorities before confusing the public with transgender stuff. They didn't even understand what transgender was and they would describe trans women as guys: 'that is a guy', they would whisper to their friends. To say the least, they didn't have any capacity to handle the legal, health and social needs of transgender and even intersex persons. I decided to form an association that would specifically focus on the needs of transgender people and Transgender Education and Advocacy (TEA) was born.

TEA has sought to address the real challenges faced by transgender people. These challenges are particularly serious because we were continually lumped into the gay and lesbian categories and because although donors themselves were putting in a lot of funds for transgender and intersex issues, these funds often fell into the hands of people who were either incompetent or very transphobic. This problem still persists and means that the specific needs of transgender people are not sufficiently addressed. For example, transgender people need legal services to change names and gender marks in identification, travel and academic documents – LGB people don't need this service. Transgender people are more visible (identification documents and physical characteristics that indicate their assigned sex and slave names – by which I mean the names

that cisgender people assign transgender people and expect them to use irrespective of how much they are unacceptable to our gendered self). Same sex attractions are not as open for society to 'read'. LGB people don't carry their sexual orientation on their identity cards, birth certificate, high school diploma or passports. Transgender people have their natal sex and slave names in these documents. Transgender people need medical services such as hormone therapy and some surgery. Gay men and lesbians don't need these services or any medical service to affirm their sexual orientation. Transgender people also face higher levels of discrimination, violence and high psychiatric and HIV prevalence rates than gays and lesbians.

I remember how in June 2009 I did a radio interview with a local radio station and immediately after I switched on my phone calls came from some gay activists who admonished me for creating confusion in the society by bringing up the transgender issues when people were beginning to grapple with gay and lesbian issues. A few months later, I realised that the levels of transphobia were escalating and I would be the first target. I was right because in 2010 and 2011 some gay activists wrote obscene things about me on their websites – websites developed and hosted with donor funds. I endured and decided that I would use these nasty experiences to prepare myself for the important struggle that was ahead of us. It was at the same time that some donors took notice of our message and started to support our legal and training work. We started offering legal aid to transgender people wishing to change their names and gender marks in their documents. We initiated talks with the government and soon we were training judges, magistrates, teachers and health-care providers on transgenderism, human rights, gender identity and sexuality issues. The media was attracted to our work the way a bee is attracted to nectar. They did an incredible job articulating our issues to the public and people requested more.

In the year 2013 we initiated our litigation project since we had exhausted all avenues for dealing with human rights violations committed by various government agencies. For example, Kenyan law provides that high school certificates can be amended where necessary. However, the Kenya National Examination Council (KNEC) declined to change the names and remove the gender mark on my certificate despite the fact that the law does not require gender marks on high school certificates. Second, the Kenya police had over years been arresting transgender women and stripping and physically assaulting them in police custody. Third, some transgender colleagues and I had applied to register our organisation so that it would operate within the confines of the law as defined by the NGO Coordination Board Act of 1990. We were all denied our rights and fundamental freedoms and we



moved to the High Court of Kenya where we were successful in all these applications. We won landmark cases that shook the foundation of Africa. We didn't just win in the court of law but we went ahead and won in the court of public opinion.

This shift in public opinion came about through a massive media campaign about transgenderism and the issues of transgender people. One of the shocking questions we were always asked was 'So transgender is not homosexuality?' The transgender community has always known that transgender persons are always visible, unlike lesbian, gay or bisexual people, since homosexuality is something that generally happens between bed sheets and in privacy. Transgender persons are visible because of the change of social roles, appearance, names and the fact that our identification, travel and academic documents carry names and gender marks that don't match our new gender presentation and lives. Transgender persons are discriminated against in hiring; gay men, lesbians and bisexual people face less risk of discrimination (unless they are outed or their sexual orientation is disclosed). Transgender persons are easy targets of physical violence because some who don't blend in with their targeted gender are easily noticed. The fact that much of the gay movement and their allies lump transgender people alongside lesbians and gay men makes transgender people victims of both transphobia and homophobia.

Changes are needed in the human rights sector in order to be able to respond more sensitively to transgender issues. Most important is that the LGB movement, human rights sector and donor agencies need to approach the LGBTI model differently. First, we need to understand that transgender people face a very different set of challenges and often have different needs and priorities from LGB people: it is a mistake to unthinkingly assume that transgender and LGB people are the same. Being transgender has nothing to do with sexual orientation (who one is attracted to); instead, transgender is about gender identity, gender roles, gender presentation and in some cases sex reassignment. Second, we need the gay movement to stop lumping the transgender and intersex communities in the gay label and erasing their issues with same-sex subjects. Third, transgender people need to be represented in meetings with donors and policymakers. We are experts in our issues and I think it is important for trans voices to be heard in the high-level meetings taking place in Washington, the World Health Organization (WHO), the European Union and other places where transgender people are concerned. Representation in bodies such as the Global Fund and the World Professional Association for Transgender Health (WPATH) need to include a diverse range of transgender persons. We need funds to focus on the real challenges of transgender

people – as articulated by transgender people. It is a dishonesty to say that same-sex marriage campaigns are taking the interests of transgender and intersex persons on board in Africa. Same-sex marriages and decriminalisation of homosexuality are not important to transgender people – especially when governments and members of the public understand that transgender people are not homosexuals.

Transgender people can build synergies with the gay movement. The following is the best example of synergy: every moment gays and lesbians are sensitising people about homosexuality we would want them to include the following:

- a) Transgenderism is not homosexuality.
- b) The needs of transgender people are different from those of homosexuals.
- c) Gender identity is not sexual orientation.
- d) Transgender persons are not sex objects for people to use for sexual experiences and fantasies.

There are respectful gay and lesbian people out there but we have transphobia in some sections of the gay movement who mistakenly think that we threaten their positions of power and access to funds. I don't think there should be any competition or feelings of threatened position. Let everyone respect transgender people's right to disagree with systems or sections of the gay movement that erode trans people's rights to self-determination and security as human beings. Let everyone respect transgender people's right to stand against those who want to put us on a leash and confine us in their small world and stifle creativity, free thought and personal development. Let us give trans people an opportunity to rewrite their narratives in a way that is accurate for posterity. Let us not put obstacles in trans people's paths because we think our way of doing things or how we choose to live our lives is better than those of transgender people. Let us respect the autonomy of transgender persons and listen to them on the best strategies to eradicate transphobia, marginalisation and poverty in the transgender community. This will not be easy and it is imperative the transgender community unite and understand that we must not give up, even in the face of alienation and rejection from those we would expect to know better.

“The fact that much of the gay movement and their allies lump transgender people alongside lesbians and gay men makes transgender people victims of both transphobia and homophobia.”



# Bridging the Gaps: A Story of My Engagement with Sexuality, Law and Social Justice

IVANA RADAČIĆ

## 1 Introduction

I was asked to contribute to the dissemination of some of the experiences and exchanges that took

place at the symposium 'Sexuality and Social Justice: What's Law Got to Do With It?' in the form of a story about my engagement with the topic. I was very happy to receive this proposal as I have been thinking for a while now about the limitations of academic language and the possibility of writing in a new genre, a genre which would bridge the divisions between different academic disciplines and challenge dichotomies of academia and activism, public and private, reason and emotions, intellect and heart, which this symposium was so good at. To challenge these dichotomies is actually not only one of the central tasks of feminism – a movement I have been aligned to for around 20 years now – but a central feature of my life story, which I am happy to share with you. It is a story of a legal academic and activist living in a society in which social justice is, due to its (recent) history, a central though divisive theme, to which issues of sexuality have only recently been added, with a lot of resistance from part of the population.

I start with a short background of the social environment in which I grew up, following with my experiences of studying law in different countries. I then discuss my academic and activist endeavours, discussing the pleasures and difficulties of working across divisions. I continue by describing

my struggle to get the title of research associate in law. I then talk about my research on sexuality and conclude with some observations on empowering communal spaces.

## 2 Living with contradictions, bridging the divisions

I was born in 1977 in the golden age of Yugoslavia, which was also a beginning of its demise and bloody dissolution, in a traditional family in the most urban

centre of Croatia – Zagreb, where I still live. My parents are both from the countryside, though from different parts of Croatia with completely different mentalities. In Dalmatinska Zagora, where my father comes from, a male child is generally still valued more than a girl, so my paternal grandmother was a bit disappointed when I was born as a second female child to my parents. In retrospect it was probably that moment that determined my feminist orientation. The contradictions with which I have lived both in terms of my own background and also in terms of the history of my society, in which almost every generation experienced war, have also had an influence on my personal and professional development. I had to develop 'translation skills' in order to understand all the facets of the society in which I was born, which has historically always been divided, some of the common divisions being between Ustasas<sup>1</sup> and partisans, communists and nationalists, religious and non-religious, traditionalists and 'pro-European,' ethnic Croatians and others (Serbs primarily). Some of the recent events that exemplify the divisions are the referendum on marriage,<sup>2</sup> the initiative for a referendum on limiting the use of Cyrillic letter,<sup>3</sup> and the protests by the war veterans;<sup>4</sup> events in which (most) people have been divided into two camps that remain pretty hostile to each other. The translation skills became very useful later in my life as I moved abroad and are still crucial in my nomadic way of living, moving between academia and activism, the 'West' and 'East', and common law and civil law jurisdictions.

In addition to developing translation skills, I needed to learn how to build bridges between the different communities instead of burning them, as there was already a lot of fire: I was growing up on the brink of the war. I still remember the moment when I heard the first siren. It was the last year of primary school; we had maths, which I have never liked so I was pretty happy when the class was interrupted. My happiness was interrupted with a hit on the head when a professor told us that the war had just started. I was not quite sure what that meant, what war was, and 20 years after the war ended I am still trying to make sense of it, and what my role in all of this was or should have been. I was not directly affected by the war: no relatives of mine lived in the war-torn areas (though some of them did live very near the battle lines), I did not have a brother who would go into

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the army, and there were no mixed marriages in my family. However, nobody escaped the war; we were all affected by its madness. While many of my current activist colleagues reacted at the time by joining the anti-war movement (for the history of Anti-War Campaign Croatia see Janković and Mokrović 2012) I was engaged with my own ‘teenage madness’.

War and its consequences remain as central social justice issues today; 20 years after the end of the war many victims had not yet received justice (Dubljević 2014; Documenta 2012). The distrust between the different ethnic groups also remains here, primarily between Serbs and Croats.

As the legal systems in the region largely failed to address crimes against women committed during and after the Yugoslav war, women’s rights activists in the region organised the Women’s Court,<sup>5</sup> held in Sarajevo from 7 to 10 May 2015. The Court was an example of the feminist approach to justice and a feminist reconceptualisation of law and legal systems. Legal systems of the region are very patriarchal and often oppressive mechanisms (for the legal treatment of sexual violence see Radačić 2014a, 2014b), which I realised already while I was studying law in Croatia.

### 3 Studying law in Croatia and abroad: very different experiences

Though I was one of the best students, I was not very happy with the studies. I enrolled in law school due to my interest in social justice and desire to work

for the benefit of the community. But social justice issues were not included in the curriculum; there was no course on human rights, feminism or other critical legal theories when I was studying, which still remains the case (see Radačić forthcoming). Teaching was done in a very hierarchical manner and in a very authoritarian style, where lectures and readings were not supposed to be questioned. We were supposed to reproduce knowledge (mostly by heart), rather than use it critically, and we were taught how to use law for maintaining the status quo rather than challenging it.

After finishing my studies I did not want to work in a law firm – and even doubted whether studying law was a good choice – so I was happy when the opportunity came to enrol in the MPhil in Criminological Research at the University of Cambridge, as a Chevening Eastern Adriatic scholar. Studying in the UK was a very different experience. This was a whole new approach, aimed at empowering the students in critical thinking and creative use of knowledge, rather than simple reproduction of facts.

Being in such an environment felt right, and I decided to continue higher education studies, this time testing how legal education was conducted abroad.

▲ African fairy-tale performance at the island of Vis, troop Vibrica.

“I needed to learn how to build bridges between the different communities instead of burning them, as **there was already a lot of fire:** I was growing up on the brink of the war.”



I hence applied for a Ron Brown fellowship for LLM studies in the USA in 2002. It was at the University of Michigan that I 'discovered' feminist legal theory. I still remember my excitement and happiness in reading academic articles on feminism, in which feminist legal scholars (who, to my surprise at the time, used the pronoun 'I' instead of referring to themselves as the 'author' or 'we' as was the convention in Croatian academic articles) talked about (their own) sexual relationships, abortions, experiences of violence, which was unheard of in Croatian scholarly publications. I felt as if I had discovered a whole new language: I realised that what I tried to speak about in isolation in Croatia was not just mumbling but a serious language, which even had academic legitimacy! I experienced the same consciousness raising that I was reading about (see MacKinnon 1982), realising how my experiences were rooted in different power structures of society. I definitely wanted to know more. This was important not only for my professional but also for my personal development, which I learnt were linked: the personal is political.

Now law seemed like a good option; I saw how it could be used as a tool for social justice. I was hence thrilled when I got an opportunity to enrol in the PhD course in Law at University College London in 2004.<sup>6</sup> I eventually decided to focus on the jurisprudence of the European Court of Human Rights as a very powerful international human rights mechanism, which at that time still marginalised women's rights issues (see Radačić 2008a, 2008b, 2008c, 2010). In my thesis I analysed women's rights case law – violence against women, reproductive rights and sex discrimination – exploring what I called the inclusive feminist approach to interpreting international human rights law that I developed, proposing concrete reforms in the Court's interpretative approaches. I was awarded the UCL Jurisprudence Review award for the best PhD contribution (see Radačić 2008a) and parts of the thesis were published as articles (Radačić 2008a, 2008b, 2008c).

During my PhD studies I had an opportunity to teach as a tutor in the International Criminal Law module and co-lecturer of Gender, State and the Law, which affirmed my commitment to sharing knowledge. I also had an opportunity to meet many interesting academics and activists, some of whom I still collaborate with. While feminism has not yet entered Croatian legal academia, I was observing and taking part in the development of the new field of gender, sexuality and law (see Feminist Legal Studies 2009), which has addressed some of feminism's exclusionary tendencies of which I became more and more aware. I was happy to meet all the interesting scholars in the field shaking the strict boundaries within disciplines and challenging the divide between activism and academia, an approach that I have adopted since then.

## 4 Between academia and activism

Parallel to my academic engagement with feminism and human rights, I became an active member of civil society in Croatia. This finally gave me a stronger sense of belonging to my country. First I cooperated mostly with women's groups, advising them on legal issues and helping them in litigation efforts. Later on I developed a research project with the women's rights non-governmental organisation (NGO) B.a.B.e. on legal regulation of sexual violence. In addition, I started cooperating with the Centre for Peace Studies, and other NGOs. While I was in London I had a fellowship with INTERIGHTS (International Centre for Legal Protection of Human Rights, based in London), working on human rights training with Serbian lawyers. The idea was that I would later coordinate such training for Croatian lawyers with the Centre for Peace Studies, based in Zagreb. I have also been engaged with feminist educational efforts within the wider region of Central and Eastern Europe. From 2004–06 I attended the regional Women's Human Rights Training Institute, a two-year non-formal educational programme for lawyers from the region, set up by the Network of East-West Women, Bulgarian Gender Research Foundation and the Centre for Reproductive Rights to address the lack of feminist education in law schools in the region(s) (see Marcus 2014). I have been lecturing at the Institute for the last ten years. It has been a satisfying experience to give support to committed women's rights lawyers working in pretty hostile environments.

It was primarily due to my desire to contribute to my society and share the gained knowledge and experiences that I decided to go back home after my PhD, in October 2007. While the law schools were not interested in my expertise, I found a place at the Ivo Pilar Institute of Social Sciences, Zagreb, an interdisciplinary environment where I was the only legal academic. I was also coordinating the training programme for attorneys-at-law in the Centre for Peace Studies. This was a very rewarding experience, as the training addressed the lack of lawyers in civil society in Croatia. Some five years after the training, almost all of the lawyers are active members of civil society and are regularly taking cases to the European Court of Human Rights.

In 2008 I had an opportunity to work in the Court. As most of my work at the time was on the Court's jurisprudence (my writings, training and also litigation efforts), I thought it would be good for me to gain practical experiences and insights into the Court's system. Working there for a year gave me a more realistic outlook. I used the knowledge I gained to litigate cases and train lawyers, as well as to critically analyse its case law. Ines Bojić, an attorney-at-law from Zagreb – who cooperated on the above mentioned





◀ V-day public performance, troop Vibrica.

project on sexual violence – and I took a rape case before the Court and won it. The importance of the *D.J. v Croatia* case is that it challenged myths about the way ‘real rape victims’ behave. The Court stated that state authorities cannot be dispensed from obligations to effectively prosecute on account of the victim’s behaviour (consumption of alcohol) or characteristics (alleged mental health issues). However, the Court failed to challenge the practice of subpoenaing a victim’s medical records and unnecessary intrusions into her private life and hence failed to challenge the idea that victims lie about being raped, contributing to their victimisation (Radačić 2014a). The Court has not utilised its full potential in challenging rape myths and its record is mixed (Radačić 2015).

Ines Bojić and I brought another important women’s rights case before the Court: a case concerning human rights in childbirth. The case of *Pojatina v. Croatia*, currently pending, concerns the problems that women who choose to give birth at home face (inability to legally contract the midwives, refusal of doctors to examine them or the children, problems with registering births) due to its unregulated status. At the time we took the case, there was a lot of resistance against framing this issue as a human (women’s) rights issue, even in the human rights/women’s rights community. Due primarily to the efforts taken by the NGO RODA (Parents in Action), human rights at childbirth became a prominent topic of a public discussion in Croatia from late 2014 when it initiated the campaign End Violence in Childbirth.<sup>7</sup>

## 5 Feminism and human rights not law in Croatia?

Coming back to Croatia from Strasbourg in 2009, I started the procedure that would give me an academic title in Law so that I could be promoted

to the position of research associate (an entry-level position). In Croatia, titles – which are a precondition for promotion – are awarded at the national rather than institutional level. First, a commission is set up at the competent institution for a particular discipline (in the case of law it is one of the four law schools) to assess whether the applicant meets the criteria in terms of the number and quality of her or his publications.<sup>8</sup> Thereafter, the national committee for a relevant discipline accepts or, in prescribed circumstances (if a decision is made contrary to the criteria or evidence and if there were serious breaches or procedural rules), rejects the opinion of the Commission. I submitted my application to the Commission of the Zagreb Law School, whose opinion was that I should not to be awarded the title in Law, even though I met the criteria (this they did not challenge), because, according to them, my work did not fall under any recognised branch of law. Instead, they suggested that I should be given a title in Gender Studies, which does not really exist in Croatia,<sup>9</sup> and in which law schools have no competence. As my case was left in the abyss, in 2011 I submitted my application to the Osijek Law School Commission, which recommended that I should be awarded a title in International Law, since most of my work was in the area of international human rights law. However, the National Committee of Law rejected this opinion in one sentence, without providing any reasons. I hence had to institute administrative proceedings. It was only after the Administrative Court annulled the decision as unreasoned, five years after I first applied, when I was finally recognised as a legal academic. At the end, the branch of law was not specified. The then National Committee of Science issued directions for the National Committee of Law indicating that the titles should be given in Law, without specifying branches (as prescribed by law), after my written communication with them.



“Problems with academia are even more pertinent today as conservatives hold more and more institutional power.”

▼ Final performance of Roma youth in Darda consisting of theatre performance on the topic of human rights, djembe concert and individual acts – project Discrimination Divides Us, Arts Connect Us.

This might open some space for more interdisciplinary studies of law, as strict divisions into branches and corresponding departments presents an obstacle for new and interdisciplinary knowledge (see Radačić forthcoming). Another positive result of my fight is that we held a few round-table discussions on human rights education and human rights in higher education. It provided a forum for young academics educated in some of the best institutions in the world and yet unable to establish themselves professionally in Croatia due to problematic rules and arbitrary

and often nepotistic practices. Finally, my story became known in international circles as ‘The Strange Case of Dr. Ivana Radačić’ (Weiler 2013). While my case gave visibility to the wide problems of academic hiring and promotions in Croatia, to this date those have not yet been addressed. Problems with academia are even more pertinent today as conservatives hold more and more institutional power.

While I was first very unhappy about my marginalisation in legal academia in Croatia, as I considered it unjust,

eventually I grew comfortable with my role as a legal outsider. I now use legal knowledge mostly to criticise law and translate the legal language to non-lawyers. In addition to teaching in Osijek Law School and in the European Inter-University Centre for Human Rights and Democratisation, in Venice, I teach law (human rights, women’s rights and law, gender and sexuality) at the Sociology Department of the Centre for Croatian Studies, University of Zagreb, in the NGOs Centre for Peace Studies and the Centre for Women’s Studies. The Centre for Women’s Studies is one of my favourite places to teach, as it is a place of empowerment for many young women and men interested in feminism. It addresses gaps in formal education and challenges the activism/academia divide. It is within this institution that most of the feminist scholarship is being produced nowadays. They published the reader I edited on feminist legal theory, which is the first reader in Croatian (Radačić 2009).

## 6 Addressing taboos regarding sexuality in Croatia

Recently I became particularly interested in socio-legal studies (see Ashfort 2010, who defines it as home for gender, sexuality and law research). Prompted by a judgment of the Supreme Court that shortened the sentence for rape on account of the so-called victim’s contribution (she hitchhiked and ‘accepted to be driven on a particular road’) I decided to do research into rape jurisprudence of the Croatian courts. Without any formal project or assistance and with just enough money to cover my travel expenses (a small grant for a US alumna from the US Embassy) I undertook research of Croatian rape laws and judicial practice with a view to identifying rape myths and gender stereotypes, challenging them and proposing reforms. I analysed files in cases of sexual violence (non-consensual sex) of four county and municipal courts (Zagreb, Split, Rijeka and Osijek), where indictment was issued from 1 January 2008, which were finally ended by 30 June 2012. The research pointed to the frequent application of rape myths in the judicial proceedings, the dominant paradigm of sexuality reflected and supported by the judicial practice being the norm of ‘possessive heterosexuality’ (Radačić 2014b).

The book, which I wrote during my post-doctoral studies at the University of Melbourne as an Endeavour Scholar, was the most widely read legal book by non-lawyers (though not by lawyers). I had a number of interviews and conversations about the book, both in print media and on radio, and was proclaimed a person of the week by the main daily newspaper. However, the judiciary has been very resistant to the proposals of the communicative model of regulating rape (Gotell 2008, 2010; Munro 2008) as many judges and prosecutors whom I trained were hardly ready





to accept that 'no' means no and could not agree that token consent, submission, was not sufficient. Some criminal law lecturers also seem not to be supportive of the communicative model (Rittossa and Martinović 2014).

My new research also looks at the social constructions of sexuality, this time in the context of sex work. In particular, I am interested in how Croatian laws and public policy on prostitution is constructed and how this affects sex workers (how they experience the legal framework). The topic of prostitution is completely invisible in Croatian academia. Public policy and legislation (which currently criminalises sex workers) is not grounded in any empirical data. Rather, legislative proposals are legitimated through the use of unsupported claims and myths about prostitution (see Scoular 2010, Weitzer 2010) defined as a 'social evil' (Ministry of the Interior 2012: 5). There is no attempt to include sex workers in the debate on the best legislative model or to commission any study on prostitution, and there is no organising of sex workers. Even though these gaps were recognised in the evaluation of the project I proposed, we did not get the money because, among other things, the project was considered too interdisciplinary, so I am currently looking for funding. Meanwhile, in April 2015 I organised the first round-table on prostitution that discussed different legislative models and experiences in Croatia. It was the first academic event in which a sex worker spoke, which was another small breakthrough in the Croatian academia.

Another little breakthrough I would like to make is to bring the (healing) arts to science. I have been practising 5 Rhythms dance for a while, and I also play cello and African djembe. Through these practices I have personally experienced the power of creative expression and body wisdom and how personal empowerment affects our surroundings. In addition to my work on social structures, I am more and more interested in working at the level of personal and community empowerment with marginalised communities through dance and public performance. I hence co-designed a summer school of socially engaged arts for Roma and non-Roma youth, which utilises arts (traditional Roma dance and singing, drumming, dance, performance) as a tool of social inclusion, as a means of creating community, which was held at the end of June 2015 in the County of Osijek and Baranja. I would also very much like to have a dance and sexuality workshop with the sex workers, and a public performance, as I see these as powerful tools for empowerment, addressing stigma and gaining visibility, as well as community building. It is the importance of community with which I would like to end this story.

## 7 Concluding observations: the power of community

I have been part of many communities in my life and they all have had influence on me, allowing certain parts of myself to be seen, to be witnessed. I am grateful to the human rights activists from Croatia and other places for providing a space where I felt secure and inspired to challenge some of the dominant norms of society on gender and sexuality, where my activism could grow and be nourished. I am also grateful for the 5 Rhythms dance community for providing the space to explore my most vulnerable parts and heart expansions. Last but not least I am very grateful for my connections with scholars from the UK, the US and Australia, as they provide a space for me to be and develop as a legal academic. It is within these communities that I recharge my batteries and explore certain parts of myself that remain unrecognised in Croatia. It is events such as this one organised by the Institute of Development Studies that affirm my belief in academic work and desire to be part of an academic community. I was hence thrilled to be part of this endeavour and to contribute to this interesting new type of writing, which might create new bridges between academic and non-academic communities.

### Endnotes

<sup>1</sup> Croatian pro-fascist movement that nominally ruled the Independent State of Croatia during the Second World War.

<sup>2</sup> Since 2000, there is greater liberalisation of social attitudes towards diverse sexual orientations. Gay marriage was not really a political issue until the initiative 'In the Name of the Family', consisting mostly of a few conservative rich families allegedly linked with Opus Dei, started the campaign for referendum. The referendum question was whether the Constitution should be changed so that it includes a definition of marriage as a union between a man and a woman. It was held on 1 December 2013; 379 per cent of registered voters voted: 65.57 per cent for the change in the Constitution and 33.51 per cent against it. There was a strong opposition to the referendum, and highly publicised coming-out stories soon after the referendum, but finally an Act on Registered Partnership was adopted.

<sup>3</sup> The initiative of the Headquarters for the Defence of Croatian Vukovar was organised after boards on Croatian and Serbian were placed in the state administration buildings in Vukovar in September 2014, and it was aimed at making the requirement for the equal official use of minority language stricter. The referendum question was whether the use of minority language should be secured where the minority population constitutes 50 per cent of the population (as opposed to 30 per cent, which is the current legal requirement). On 12 August 2014, acting on the initiative from Parliament, the Constitutional Court prohibited holding the referendum as the question was held contrary to the Constitution. There was a strong opposition to the campaign (All of Us – For Croatia that Belongs to All of Us).



<sup>4</sup> Protests started in October 2014 when a camp was settled in front of the Ministry of War Veterans. The demands aimed to secure certain rights and the resignation of the top cadres in the ministry. The protests were politically coloured, with the use of nationalistic rhetoric and symbols, and the leaders having connections with the leaders of the opposition party HDZ. A few anti-protests were held as well, which almost resulted in violence.

<sup>5</sup> [www.zenskisud.org/en](http://www.zenskisud.org/en) (accessed 24 July 2015).

<sup>6</sup> Professor Philippe Sands offered me a position as a fellow in the Centre for International Courts and Tribunals and hence enabled me to study, for which I am really grateful. Later on I got a Frederick Bonnard Brauthal scholarship, for which I am thankful.

<sup>7</sup> [www.roda.hr](http://www.roda.hr).

<sup>8</sup> Evaluation of quality should include only checking the classification of journals but in some instances these commissions evaluate already published articles.

<sup>9</sup> Gender studies was recognised as a scientific field and interdisciplinary area of science in the 2009 Rules on Scientific Areas, Disciplines and Branches but there are no gender studies programmes or gender studies departments in Croatia.

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# Stifling LGBT Voice: Between Populist Politicians, Prejudiced Media and Opportunistic Evangelists and Charities

## GATETE TK

Consensus seems to prevail on the presence of homosexuals in the midst of Africans since time immemorial (Amnesty International 2013). However, until today they have not been allowed to express their sexuality openly and fully. Some would conceal it, including by acting heterosexual; those who did not were stigmatised but rarely ostracised (Tamale 2011). African societies have had ways of managing their diversities (*ibid.*).

Sexuality has been broadly taboo in African societies, both for heterosexual and homosexual sexual conduct (Gatete and Haste 2015): 'Everyone knows who does what with whom. You will know that they know you are gay, if they keep asking your age mates, "when are you getting married?" but not you', a gay friend once told me.

The advent of international human rights categorised them as first and second generation; prioritising civil and political rights on the one hand, and relegating economic, social and cultural rights as subsidiary. This discourse brought about a skewed pursuit of individual rights without sufficiently accommodating environments in which the individuals lived. This made it difficult for such discourse to thrive within complex African contexts and created, as is the case with gay rights today, antagonism, which in turn exposed the individuals in need of rights protection to more harm and risk from their own societies (Gatete 2013).

That discourse is now being abandoned, in the interest of 'Respect, Protect and Fulfil' – a pragmatic way of looking at rights and negotiating self-realisation through common interests. From an African standpoint, however, the mindset of the West is reluctant to embrace the new discourse of respect,

protect and fulfil and continues to adopt a 'Victims, Savages and Saviours' approach, in which the victims are the individuals or minorities persecuted by their own kind, savages being their own kind and they, the West being the saviours (Mutua 2001).

Africans feel bullied when their priorities are defined for them, and thus will only reluctantly adhere to those priorities. As a result human rights movements that espouse the position of individual rights are eschewed for they are seen to advance an alien agenda. Human rights enforced in that manner are not sustainable, as they do not empower surrounding forces to safeguard them. Western powers respond by establishing watchdogs, which repeatedly report failure by the locals to live up to these

rights and criticise the locals for being 'savages', etc.; it is a nightmarish lose-lose situation.

Not least, African societies privilege common over individual interests. The advancement of rights thus requires tactful and subtle language that demonstrates that common interests are pursued by promoting individual rights.

In Africa, gay rights and women's rights had to compete with androcentric, patriarchal cultures as well as religions that had been entrenched for hundreds of years and still define our societies to date.

In Rwanda, gay rights were advanced through using the language of solidarity, of oneness – 'we are all Rwandans' – and of health. Thus the campaign was framed through a locally led narrative that emphasised the idea that in Rwanda people could be accommodated regardless of their differences. It also tapped into the language of health at a time

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▲ Ugandan newspapers with headlines relating to Uganda's anti-homosexuality laws. Since President Museveni's law from 2014 a climate of fear has spread among the members of the country's gay and lesbian community.



when Rwanda was working to position itself as a leader in HIV prevention work.

The most recent example of this lack of attention to the local context can be found in President Obama's recent visit to Kenya (see Ghoshai and Leskow 2015). If Obama genuinely wanted to advance the rights of lesbians, gay, bisexual, transgender and intersex (LGBTI) people in Kenya, he would have raised the issue with his Kenyan counterpart at length and in detail and reached a concrete, joint roadmap. However, by making a political, or rather populist, stunt before his travel to Africa, he antagonised Kenyan public opinion, which is a key stakeholder in ensuring that the rights of Kenyan LGBTI are respected, protected and fulfilled.

“The advancement of rights thus requires tactful and subtle language that demonstrates that common interests are pursued by promoting individual rights.”

He generated international approval for himself and attracted sympathy for Kenyan LGBTI the world over, except in Kenya. He usurped the powers of Kenyans to define their own society without bullying and forced them to appear homophobic – which played into a rather pervasive narrative in the West about the rest. In the end, the controversy he created around LGBTI rights only succeed in making him popular in the US, but potentially increased the risk for the LGBTI community in Kenya. He violated the one rule of sustainable advocacy, which is being context-sensitive – but this

opportunity was missed in favour of short-term media and lobbying opportunities.

LGBTI persons and groups are not criminalised in Rwanda. However, members of the LGBTI community continue to experience stigma and other hardships in relation to their sexual orientation. The future looks bright, however; as a result of tremendous work conducted by local human rights activists, encouraging strides have been made politically, conceptually and programmatically in expanding the protection and empowerment of LGBTI people in Rwanda and in the East African Community at large.

The law in Kenya may still be what it is,<sup>1</sup> but LGBTI people are better treated in Kenya than anywhere else in the East African region, including in Rwanda where LGBTI rights are guaranteed on paper.<sup>2</sup> Some of the most open global sexual minority conventions, such as Changing Faces, Changing Spaces, organised annually by UHAI-EASHRI (East African Sexual Health and Rights Initiative), are held in Kenya, but could hardly be imagined in Rwanda. There are allegations that the Kenyan Chief Justice, Hon. Willy Mutunga CJ, may be homosexual. These unsubstantiated rumours are fuelled by his atypical wearing of an earring (see Anaminyi 2011). Whether true or false, it is interesting to see that such a peculiar outfit has not stopped his

appointment as Chief Justice or dented his highly held reputation.

In Uganda, following a protracted battle, also espoused on the one hand by populist politicians and evangelists, and by international media and opportunistic charities on the other, the Supreme Court of the Republic of Uganda came in as *the voice of reason* and repealed the law criminalising same-sex conduct.<sup>3</sup>

In Rwanda impressive measures have been taken by the government and especially its Ministry of Health, no thanks to any international intervention, be it governments, charities or evangelists. Rwanda's recent history of the failure of international community to stop the genocide against Tutsi somewhat shields the country from international influence and leaves it some space to define its destiny; a luxury that Kenya doesn't clearly possess – sadly.

In conclusion, that very same hostile Kenyan public opinion, the one that wanted to march naked in protest at Obama's speech, those 'savages' as so portrayed in Western media – they are the ones who will *respect, protect and fulfil* the rights of Kenyan LGBTI. It is not any distant forces overseas and much less Obama. For them to do so, they have to feel responsible for their kin, and left to find an answer within their culture, history and legislation to address yet one more Kenyan societal issue.

Kenya is for Kenyans, with its problems, solutions and aspirations; for better or worse...

#### Endnotes

<sup>1</sup> Article 162(a) of the Kenyan Penal Code, 2008, [www.kenyalaw.org/Downloads/GreyBook/8.%20The%20Penal%20Code.pdf](http://www.kenyalaw.org/Downloads/GreyBook/8.%20The%20Penal%20Code.pdf).

<sup>2</sup> Rwanda's Penal Code does not criminalise homosexuality; in fact the National Strategy to Fight HIV/AIDS recognises men who have sex with men (MSM) as 'Key Population' and provides health services for them and support to their NGOs.

<sup>3</sup> See Adrian Jjuuko, this Collection.

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# SOLIDARITY

## Why Are We Still Not Acting?

BISI ALIMI

### 1 Introduction

Shifting gear from being an activist to being an advocate means no longer going to policymakers and shouting 'I want, I want, I want!' Instead, as an advocate, we need to establish a baseline of where we are now and assess the institutions and mechanisms that keep the status quo in place. We need to look, too, at where we stand along the spectrum of potential actions in order to develop a strategy to get to where we want to go. In this piece, I describe three main issues that limit our work as advocates based on the dynamics of the global North–South relationship, and I suggest some ways that we can move beyond this impasse in the future. My knowledge is in Africa, and so this is the context I will refer to.

#### 1.1 He who pays the piper, calls the tune: funding and North–South dynamics

The money is in the global North, whether we like it or not. He who pays the piper, calls the tune. So unless we have a funding mechanism in place that is funded and controlled by Africans, it will not be possible to shape the ideas that guide the funding and that can create better responses. Donors have their own set agendas and their own restrictions. This means that no matter how creative or wonderful the idea is, or whether it can make change happen faster, donors are not willing to listen or compromise. This creates a lot of friction between the South and the North. We know what will work in our settings, and we know how to make these things work.

“Unless we have a funding mechanism in place that is funded and controlled by Africans, it will not be possible to shape the ideas that guide the funding and that can create better responses.”

We also know that a funding cycle that is only one-year long is not going to work. If you want to invest in change, you need to invest for three to five years. Donors need to recognise that we understand the reality on the ground, and we also want to make the funding work; but we have to work at the same level.

One of the unintended consequences of funding is that we have unrealistic programmes that people can think up and submit to donors to receive funding. They get this money and they cannot proceed with their deliverables. Then there is the

tension between the advocates in Africa and the people who have the money in Europe or America. So the funding is not only problematic for the African people but also for the people who are funding the donors like the UN.

#### 1.2 Intellectual property and North–South dynamics

Because of these restricted approaches to funding by donors in the global North, organisations in the global South feel that they need to 'Westernise' their advocacy in order to get money. This means that they come up with advocacy that they know will not work in their community, but that they know will be funded. This raises the question of how to fund projects in the global South in a way that does not compromise the job that needs to be done. This in turn connects to ownership of ideas and intellectual property.

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### Example: The (failed) case of marriage equality in Sierra Leone

A project started in Sierra Leone to promote equal marriage. The person who started this project received a lot of funding from the global North because marriage equality sells. At that time, the global North was pushing for gay marriage: the UK had civil partnership and other countries such as the United States were pushing for equal marriage. This person from Sierra Leone was able to convince donors that he could push for gay marriage in his country. He got really excited and received support from funders, and so he thought he could do it. But then he went home to try and implement the project and was forced to run out of the country as a result. This is a very simple example of how lesbian, gay, bisexual, transgender and intersex (LGBTI) people need to have basic rights before we start looking at marriage equality.



“Part of changing the conversation requires us to look at how we can share experiences, resources and expertise in the global South.”

If I conceive a project that is then funded by the North, what right do I have to call the project my own? Is it my project or the donor's project? There is a conflict between who owns the idea, who funds it, and who decides what needs to be done. Donors that develop ideas for projects based on their own understanding of what should happen, rather than the understanding of those living in the global South, will then fund projects that are not informed by practical goals and useful strategies. All they will get out of it is a no-good report. This dynamic has created a lot of tension and distrust.

The issue of intellectual property also relates to ownership of ideology symbolised by the products of funded programmes, such as reports. On the one hand, if the name of the donor is not on the report then the donor cannot refer to the report and their ability to raise further funding is reduced. On the other hand, if the people who have carried out the project put the donor's name on the report, this

will be seen by some local people and communities as pushing Western ideology rather than accurately reflecting local cultures.

### 1.3 The diaspora and North–South dynamics

A huge amount of people are going to the North from Africa. We see groups of Ugandans and Nigerians called in the diaspora who have left because of their country's anti-same-sex laws. These diasporas are considered as being a part of the global North by those who stay in African countries in the global South. Members of the diaspora have an identity crisis as they do not think of themselves as part of the global North. They also do not receive any funding, because they are not seen to be part of a local initiative in what is geographically considered to be the global

South. This challenges the clear construction of the global South and North. Underlying these constructed divisions is a group of people who no longer live in the global South but are not fully accepted or supported in the global North. This confusion creates that friction and tension in the movement. People leave their countries believing they will be rescued, but when they arrive in the global North there is not enough support for them.

## 2 Changing the conversation: Where do we go from here?

### 2.1 Creating conversation: listening more and fighting less

Donors need to listen more and hear what activists are saying about the issues. But those in the global South also need to realise that we do not have the money. The money comes from the global North and we need to learn to have a better approach with donors; and donors need to learn to not push their own ideas, too. We should be able to have intelligent conversations around what will work and what will not work. This mutual respect will go a long way. I have seen many African activists very hostile, aggressive and angry towards Western donors and this needs to stop because we are fighting ourselves while the bigger enemy is out there having a field day. We need to reconnect and we need to reassess our relationship and reassess our respect as well.

### 2.2 Investing in ourselves: South–South partnerships

South–South relationships are happening. It is starting! When we were in Washington DC three years ago looking at the social costs of homophobia we discussed how we could collaborate across Asia, Africa and Latin America without having to engage North America and Europe. We are also exploring how to creatively share ideas and reforms through an intercontinental approach. I have just returned from Nairobi where

### Example: The (failed) case of women's empowerment in Nigeria

In the early 2000s, we received huge funding for a women's empowerment and HIV programme in Nigeria. The programme trained women (over and over again) to be in control of their sexuality to protect themselves from HIV. I had the most problem with the process. I come from a patriarchal system, and in that system, no matter how much you train a woman or empower a woman, she will go back home and be with the man. This particular 'empowerment' training was based on a Western conception of how the Western woman can be assertive and in control. But the donors were not culturally sensitive to the fact that there are different ways in which African women or Nigerian women assert their power compared to Western women in Europe or America. I remember one of our monitoring and evaluation people saying that this 'empowerment' approach would not work unless we included the men in training, unless we got the men to join. But it was not expected that global staff would understand these logical points. Now we look back on it, and we know that this approach to empowering women in isolation from men has failed. Donors now know that initiatives to reduce HIV transmission need to include both men and women. This approach can also help deal with incidences of rape and domestic violence. We knew this 20 years ago. But it has taken donors almost all that time to listen to us, to take this learning forward in their programmes.



we are trying to set up a diaspora-funded mechanism where gay Africans living in the diaspora make a monthly contribution towards mechanisms that will fund African LGBT rights. This is not a Western initiative. This is an African initiative, with black people living outside of Africa and the Caribbean donating money every month to the continent. This is a way to change the conversation. Part of changing the conversation requires us to look at how we can share experiences, resources and expertise in the global South, so that we are investing not only our time, ideas and skills, but also our money.

### 2.3 Investing in activism: flexible and fair funding

Some recommendations for flexible and fair funding to promote LGBTI rights:

- Donors to put a certain percentage – 15–20 per cent – of their yearly allocation towards flexible funding. This would help many organisations to test their ideas and run pilots to see what works.
- Activism needs to be professionalised in Africa, just as it is being professionalised in the global North. The idea that African activists should do this work as volunteers is based on the assumption that they do this out of passion, but it does not recognise that they also have commitments, homes and bills to pay. Activists should be paid at least a minimum wage.
- Decrease the number of conferences we have every year and direct this money to support capital investment in buildings, computers and security. This is a more proactive and constructive way to support the struggle for LGBT rights.



◀ In January 2014, three young men were flogged 20 times in a court room in Bauchi, Nigeria. Since homosexuality was criminalised arrests have multiplied, advocates have been forced to go underground, some people have sought asylum overseas.



# International Solidarity and its Role in the Fight Against Uganda's Anti-Homosexuality Bill

ADRIAN JJUUKO

## 1 Introduction

The world is an increasingly interconnected place. What happens in one country is instantly known by anyone interested in any place on the globe. This interconnectedness makes it possible for international campaigns to be carried out around an issue in real time. Many issues are now matters of international concern and human rights are increasingly standing

out as a case in point. It is no longer possible for a state or citizens to claim that human rights issues in their own territory are entirely their own concern and so other states and citizens of other states cannot and should not be concerned with them. Other states and their citizens are increasingly at the forefront of taking other states to task on their human rights records.

One of the human rights issues that is currently of almost universal concern is lesbian, gay, bisexual, transgender and intersex (LGBTI) equality, and perhaps nowhere else has the issue been more at the forefront of international discourse than in Uganda in the recent past. This is because of the tabling of the Anti-Homosexuality Bill/Act (AHB/A), which had provisions that sought to further criminalise homosexuality and virtually stop advocacy and support for LGBTI rights in Uganda. Countries based in the global North such as the United States of America, the United Kingdom, Sweden, the Netherlands, Canada and their citizens have largely been involved in the LGBTI rights discussions in Uganda on the side of seeking protection and respect for LGBTI rights.

Foundations and organisations based in the 'West' have worked closely with local organisations in this struggle. For the support provided to the pro-LGBTI groups by Western countries and their citizens, it would not be an exaggeration to say that it was a little too much and in this regard quite surprising. International support included funding, lobbying of the government, petitions to the government

and parliament, international recognition of local activists, skills trainings and exposure to comparative perspectives. This support was shown right from when the Anti-Homosexuality Bill was tabled in October 2009, through the time it lay with the Legal and Parliamentary Affairs Committee of Parliament and the time it was passed by Parliament in December 2013. It continued as the bill was signed into law by the president in February 2014 and came into force in March 2014, to its final nullification by the Constitutional Court on 1 August 2015, and even after its nullification, and it continues to date. This article seeks to analyse the nature of the international solidarity during this struggle, what was helpful and what was not, how the international support supported local efforts, and finally some of the downsides of this support. It is written from the perspective of a key participant in the five-year struggle.

## 2 The beginning of international solidarity

The tabling of the Anti-Homosexuality Bill (AHB) in October 2009 found a nascent, but rapidly organising, LGBTI movement in Uganda. However, the movement had already begun to establish strategic relationships and was able to attract support from mainstream organisations within Uganda, who were perhaps shocked by the harsh nature of the provisions of the bill and the realisation that it could affect organisations that were working on human rights issues generally. Its tabling immediately attracted international attention to Uganda, and the first reaction by other states was to threaten to cut aid. Sweden led in this endeavour (see Terkel 2009). International organisations immediately issued strong statements condemning the bill (Human Rights Watch 2009). This reaction, however, was met with increased support for the bill within Uganda and vilification of the states that had threatened to cut aid accusing them of wanting to control Uganda through neocolonialism and foreign aid. It thus became clear right from the word go for the group against the bill that there was a lot of support out there, but this support must be harnessed if it was to be beneficial to the cause.

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▲ Miiro was taken to the police by his community in Kampala to be sentenced for life imprisonment. He went into hiding for two-and-a-half months and then received US\$160 relocation money from a non-governmental organisation



From the beginning, international solidarity played an important role. When news of the tabling of the bill filtered through, it was during the course of the 2nd Changing Faces Changing Spaces (CFCS) conference organised by UHAI-EASHRI, the East African Sexual Health and Rights Initiative in Nairobi in 2009.<sup>1</sup> Members of the fledgling Ugandan LGBTI movement were there and so were members of that part of the women's rights movement that had come up to embrace LGBTI rights.<sup>2</sup> There were also donors in attendance at the meeting. A small group thus met and the entity that was later to be baptised the Civil Society Coalition on Human Rights and Constitutional Law (CSCHRCL) was born. The group agreed that both local and international solidarity was to be a key feature in the opposing of the bill and strategised on how it had to be sought and managed.

From the onset, the CSCHRCL guided international attention and channelled it into positive energies as much as it could. The formation of a grouping that the international groups could trust, access and easily work with was seen as particularly important by the donors, governments and foundations that wanted to give support. It helped to give advice, act as a springboard for ideas, a channel for the financial support that came in and a forum for the technical support that was to be given. The CSCHRCL immediately created a position for a coordinator, whose role was to coordinate the activities of the Coalition and coordinating, responding to and guiding the international response to the bill was a key part of this role.

The reasons why so much attention was paid to Uganda – much more than was seen elsewhere in countries such as Nigeria, which had tabled an almost similar law earlier – are subject to debate and speculation. However, what seems to be the key issues that stand out are: the existence of a fairly organised local body that could call for and respond to offers of support; and the realisation that this was going to be a trend towards retrogression on LGBTI rights now that Uganda was following Nigeria and so the fight needed to stop somewhere. But perhaps above all, it was the harshness of the provisions, especially the death penalty, that the bill provided as the punishment for 'aggravated homosexuality',<sup>3</sup> and the general trend of the bill which was criminalising people on the basis of an immutable attribute – sexual orientation and gender identity.

The other reason, which again will be discussed in light of international solidarity, was that of Uganda being a 'softer target'. This meant that unlike Nigeria, which was a more established economy that could not be easily threatened with things like aid cuts, Uganda was a much easier target, with a high dependency on donor aid and also a president

who was a 'darling of the West', one of President Clinton's 'new breed of African leaders'. In such a situation, international pressure was likely to work. Whatever the reason was, there was no lack of international attention on Uganda during this period, and international solidarity could be said to have been at its best.

### 3 The nature of international solidarity

International solidarity came in many different forms. These forms were:

#### 3.1 Morale boosting

There is perhaps nothing that energises a person engaged in a struggle like knowing that there are supporters out there who view the person's cause as worthy. Indeed, in a seemingly hopeless struggle against an overwhelmingly popular law, such support becomes a lifeline, and international solidarity provided this lifeline. Where statements and stories on the work of the activists could not be published in Ugandan media, they graced international media;<sup>4</sup> where activists were not able to see their own leaders, they would be welcome in parliaments and state offices of other countries;<sup>5</sup> where activists could not be recognised for their role and instead castigated, international solidarity showered them with awards and international recognitions.<sup>6</sup> All these helped very much to maintain and sustain the energies of the activists in such a struggle against a leviathan.

#### 3.2 Funding

A campaign of this nature could never have been run that efficiently without money. The Coalition right from inception received generous funding from foreign institutions to support its work. The Coalition benefited from funds from the Norwegian and UK governments, as well as funds from US,<sup>7</sup> Norwegian,<sup>8</sup> UK,<sup>9</sup> Kenyan<sup>10</sup> and Dutch<sup>11</sup> foundations. The funders immediately understood the nature of the struggle and made available easy to access funding for the Coalition to run its campaigns. For urgent funds like those needed for the strategic litigation cases, intermediate donors, especially UHAI-EASHRI, played a key role in availing money at short notice. This enabled the immediate filing of cases such as the Rollingstone case,<sup>12</sup> and even the challenge to the AHA itself both at the Constitutional Court<sup>13</sup> and at the East African Court of Justice.<sup>14</sup>

#### 3.3 Leverage

The state supporters are particularly important in this regard. States have leverage over other states and usually states listen more to other states than to individuals and for some African states, even their own citizens. As such, having such strategic state



supporters such as the US and the UK was very important in providing the necessary leverage. The US was perhaps the most important of such actors. During the period between the bill being tabled in parliament and its nullification by the court five years later, the US President, Barack Obama, spoke out against the bill on a number of occasions calling it 'odious' soon after it was tabled and after it was passed warned that this would affect the relationship between Uganda and the US significantly (BBC 2010). He was always seen as a main supporter of efforts against the AHB. US Secretary of State, Hilary Clinton, her two successive deputies during the period, and a number of assistant secretaries of state visited Uganda and the bill was always one of the priority issues. A number of other officials, including Johnny Carson who was formerly Ambassador to Uganda also visited. Almost all these officials held meetings with civil society and government officials and they certainly played an important role in keeping the bill at bay. During the visit of Secretary Hillary Clinton, she gave the Human Rights Defenders Award 2011 to the CSCHRCL<sup>15</sup> thus immediately highlighting its work and clearly showing how much LGBTI equality was a priority issue for the US government. The author, representing the CSCHRCL, attended the 'LGBTI Rights are Human Rights' speech by Mrs. Clinton in Geneva ahead of Human Rights Day 2011 (Clinton 2011) and also met her at the sidelines of the Community of Democracies meeting in Vilnius, Lithuania. The UK prime minister, David Cameron, threatened to cut aid over the bill (BBC 2011), and so did many other countries, which certainly helped to shape the Ugandan government's view on how important this bill was. Many meetings were held with different ambassadors representing different countries, and many different meetings with foreign ministers and other key officials also took place in the capitals of the different states. Quiet diplomacy was the main tool that the different ambassadors were urged to use, and they sometimes did.

### 3.4 Capacity building

Whereas this was the first time that the LGBTI community in Uganda was getting organised for such a long and protracted struggle for equality, other people elsewhere already had the experience and expertise. They thus helped in terms of building the capacity of local organisations to engage, lobby and challenge the bill. Documentation of violations was a key component of this capacity building and LLH, Norway, and Benetech of the US among others provided this support. The Swedish RFSL (Swedish Federation for Lesbian Gay, Bisexual and Transgender Rights) was a key partner as regards capacity building and so was the Robert F. Kennedy (RFK) Human Rights Foundation, the Human Dignity Trust, and INTERIGHTS (International Centre for the Legal

Protection of Human Rights) of the UK as regards the law and human rights. This support helped to collate evidence of violations and also to develop and successfully work on the cases.

### 3.5 Lobbying

Some of the foreign actors including diplomats lobbied the Ugandan parliament. Many attended the public hearings organised by the Legal and Parliamentary Affairs Committee, which was handling the bill. A number met with the chair of the Committee, as well as the Speaker of Parliament. The president was also directly lobbied by different groups and diplomats. Among those who met the president was Ms Kerry Kennedy of the RFK Foundation. The different groups also lobbied their own governments to put pressure on Uganda in these issues. Key among these groups is the Council for Global Equality of the US, which worked closely with the State Department on this issue. The lobbying done was largely through 'quiet diplomacy' where what was discussed was kept confidential between the diplomats and the governments. The international community also helped to write open letters to the Speaker of Parliament and the chair of the Legal and Parliamentary Affairs Committee of Parliament. This made it quite clear to all stakeholders that other persons beyond the citizens of Uganda were very interested in the outcomes of this process.

### 3.6 Providing visa support, asylum and temporary refuge to activists

Many countries gave visas to activists to travel to their countries for advocacy purposes. Some activists were able to claim asylum in countries where they went to when the going got tough. This was sometimes done through the lobbying and cajoling of international supporters who were concerned about the plight of Ugandans. The bill in Uganda also spurred debate on asylum laws and how they applied to LGBTI asylum seekers. There were many discussions in the UK, Canada and the US over the asylum policies and laws. Others were able to get fellowships and be away from Uganda for some time. Visas were also rather easy to obtain for most LGBTI activists who wanted to travel and sometimes the visa procedures would be simplified for them.<sup>16</sup>

### 3.7 Security support

Many international groups established LGBTI-specific funds to help in cases of emergencies, including arrests of LGBTI people and medical and other emergencies. Emergency funds for human rights defenders were set up. Protection International provided security

“International solidarity greatly amplified the local struggles for equality.”



support, and so did Frontline Defenders, in addition to the regional East and Horn of African Human Rights Defenders Project (EHAHRDP). Security was important since the campaign involved media exposure in a hostile environment.

### 3.8 Advocacy

International organisations were directly involved in advocacy against the AHB. The outstanding international organisations in this regard were Human Rights Watch and Amnesty International. The International Gay and Lesbian Human Rights Commission (IGLHRC) also supported advocacy actions. These groups would take the government to task over the law and the treatment of LGBTI persons generally. There were solidarity marches to Ugandan embassies in many cities and rallies calling for the law to be withdrawn. In 2010, a 400,000-signature petition from all over the world was delivered by Avaaz to the Speaker of Parliament.<sup>17</sup>

International actors therefore played many different roles in the struggle against the AHA, and this role cannot be underestimated.

## 4 How international solidarity was useful

All this solidarity with international actors was very useful and indeed it can be justifiably claimed that without foreign support, the Ugandan activists would not have achieved much by themselves.

International solidarity was useful because of the following:

### *It portrayed the issue as one of international concern.*

Foreign involvement showed that this was an issue that concerned not only Ugandans, but the international community generally. Indeed, when the AHB had just been tabled, President Museveni had to come out and warn his party members to 'go slow' on the bill since it had become a foreign policy issue. The US government clearly showed that it regarded the protection of LGBTI persons as a priority as so did many other governments. It was thus quite clear that the issue was an issue of concern to every country and that Uganda could not argue that it was an entirely internal matter.

**Visibility of the local struggles.** International solidarity greatly amplified the local struggles for equality. The Ugandan struggle was played out in front of huge audiences and before the whole world. The murder of activist David Kato was reported as international news on leading international stations; the tabling of the bill and its passage and nullification were practically played out on an international rather than a local arena.<sup>18</sup> The Ugandan struggle became the personification of the struggle for LGBT equality worldwide. Ugandan

activists Frank Mugisha, Kasha Jacqueline and Pepe Julian Onziema became internationally known and the plight of Uganda's LGBT community was in this way brought out to the world. The AHB became an issue for everyone in the world with even 400,000 persons from all parts of the world signing a petition to oppose the bill.

**Movement building.** Due to the support, the LGBTI movement in Uganda grew rapidly to include key supporters from the mainstream civil society and from opinion leaders. The Coalition itself included more than 20 mainstream organisations and they were all supportive of the cause and part of the movement. There was increased capacity building, which changed how many LGBTI organisations did their work. Projects like the PAL project by FARUG which was facilitated by international supporters helped to further develop the capacity of organisations. The Human Rights Awareness and promotion Forum (HRAPF) was supported to register unregistered LGBTI organisations under the existing legal provisions, and the Coalition helped to fundraise for its members to run projects. With input from the international community, the LGBTI movement developed rapidly and became more effective. There was more focus on quality of work and there was more accountability.

**Putting pressure on the leadership.** International solidarity around the bill was so high that it was obvious to the Ugandan leadership that this was not a matter to be treated lightly. The pressure was visibly higher on the president, who despite his earlier anti-gay stance, was seen to take no sides on the bill, and eventually appeared to be pushed to sign the bill into law by popular opinion. He wrote a letter to the Speaker of Parliament clearly showing that passing the bill was not a priority and then as the pressure mounted, he referred the matter to the ruling party caucus and later to scientists whose report he used to justify signing. He clearly indicated that this was not good for Uganda's international image and though he castigated the 'West' it was clear that he was under pressure. He had to make promises to diplomats some of which he was later to break. He was almost becoming a pariah with protests against him and his officials whenever they travelled in the West (see, for example, *Daily Nation* 2014) and the passing of the law almost affected his US–Africa Summit attendance, which was only saved by the timely Constitutional Court decision that struck down the AHA in 2014.<sup>19</sup> Also under pressure was the Speaker of Parliament, who nevertheless made it a personal mission to pass the law. Thus pressure, which kept piling up, perhaps eventually reached the court, which had to fast-track the case and decided it on the basis of quorum alone, which made the whole Act unconstitutional.





▲ 83-year-old Anglican Bishop Disani Christopher Senyonjo, one of Uganda's few religious leaders who supports LGBT rights.



“Usually he who pays the piper calls the tune, and once in a while a few not very useful projects had to be implemented where the donors insisted.”

**Protection of activists.** Activists were also protected during this period from arrest and from further violations. Some activists became international celebrities and if they had been harmed, questions would have been raised, as happened when David Kato was killed. Indeed, there were demands by the international community for the government to investigate the murder of David Kato and the Inspector General of Police had to write to the missions explaining the actions that had been taken. Among those who made statements when David Kato was murdered was US President Barack Obama and Secretary of State Hilary Clinton. Therefore with such attention, it would have been risky to arrest leading activists and indeed this never happened, though even without arrests, many later did have to flee the country due to the actions of non-state actors. This visibility greatly helped to keep the movement moving forward.

In these and many other regards, international solidarity became an important tool in the struggle against the AHA and perhaps it was at the back of the mind of the judges when they made the decision to fast track the hearing of the Petition.

## 5 The downside of international solidarity

Too much of a good thing sometimes ends up being bad, and the international solidarity around the AHB/A had some negative elements.

These are:

**Hijacking of the agenda of local activists.** There are usually no equal power relations between local activists and international supporters. Uganda was no exception. Usually he who pays the piper calls the tune, and once in a while a few not very useful projects had to be implemented where the donors insisted. This is a soft operation of power, which is not always immediately obvious, but there were occasions when actors in the struggle felt that they had to undertake a particular action because a donor wanted it. These projects that were not necessary or that the activists did not feel important were thus a hijacking of the agenda of the activists by members of the international community and something that was indeed regrettable.

**Negative perceptions by the general public.** Because of the international support, the Ugandan public usually perceives LGBTI activists as being Western agents and people who are puppets of the West. This perception is widely held and fits well into the classic

assertion that homosexuality was simply imported into Africa and that the persons responsible for the importation are still doing all it takes to make it acceptable. Many people still believe that activists are doing the work for the sake of money and not out of conviction. These are all very negative perceptions that have the effect of making the LGBTI cause unpopular in the country.

**Damaging actions.** Sometimes partners do certain things that are damaging and a few such things were done in the AHA struggle, especially by groups that never consulted. These include simply coming in to the country without consulting, talking to judges about cases and speaking out in Ugandan media when it was not the right time. Of course, what stood out most were the announcements that aid would be cut if the bill passed. What was more annoying is that these were made even after activists advised against them in private meetings, due to their potential to bring to the fore sovereignty issues and the fact that aid cuts would also affect LGBTI people. Moreover, announcing that aid would be channelled to civil society made civil society targets, which is perhaps why the NGO Bill, 2015, was tabled with its provisions that threaten to silence civil society.<sup>20</sup>

**The saviour-savage attitude.** Whereas most of the international supporters were respectful and good, there were many who were cocky, disrespectful and who regarded Ugandan activists, people and leaders as stunted, backward and ignorant. These supporters tended to be horrified that Uganda was proposing such a law and it would be obvious that they would be thinking that the real cause was backwardness and inability to move forward. This attitude was not usually spoken but it could be felt. It was usually implied that the saviours were coming to rescue the savages (see Mutua 2001).

**Selective application of pressure.** Sometimes it seemed as if Uganda was a victim just because it had come up with an obnoxious law. Many countries have worse laws including the death penalty and, in fact, many apply the laws, when Uganda rarely does. However, the pressure applied to Uganda was not commensurate with what was going on. It seemed to be that Uganda was a weak spot that could be targeted. Countries such as Nigeria got off more easily and countries such as Saudi Arabia, which have much tougher laws, remained friends to the US, and other countries and their laws were not even mentioned in conversations. This selective criticism made one doubt the genuineness of the supporters and always made one to want to defend Uganda, to explain the more accommodating aspects of the country and to suspect something deeper.

**Divide and rule.** Some international actors simply accelerated conflict and disagreements within the



movement. This was through wanting to talk to each of the members of the coalition individually and then make decisions based on an individual's views rather than the whole group. This worked because it made those who had been selected to see themselves as important and to exclude other voices more. This affected cohesion and created big class divisions within the movement.

**Neglect of local voices by leaders.** Because of international voices, the local voices did not matter at all to the government. Despite the many press statements issued, none were responded to and the state acted as if it was never aware of the Coalition. Indeed it later emerged that Ugandan leaders were really not happy with the Coalition's work, and asked the host to stop hosting it or risk closure. When a system like this is built, the state officials only listen to the foreign voices and not the locals, and this is perhaps what happened in this case.

## 6 How international solidarity was managed

Despite the overwhelming international pressure, the CSCHRCL and the broader LGBTI movement managed to control international attention and direct it towards helpful channels. This was done through constant communications that the Coalition had to be informed before actions were taken and that the Coalition would advise on when public pronouncements would be useful and when quiet diplomacy would be more effective. The Coalition did this effectively and during this period, it issued many such advisories.

In some cases, however, the partners would do exactly what they wanted, without regard to the wishes of the Coalition. The biggest culprits in this were the states which seemed to put the need to be seen to be doing what their citizens wanted ahead of those of LGBTI organisations and people in Uganda.

The Coalition also kept the international community adequately informed of what was going on. A listserve with the known actors was established and constant updates would be given on what the Coalition was doing and what it intended to do. This kept everyone informed and perhaps helped to avoid duplication of efforts.

## 7 Suggestions on how international solidarity can work better

International solidarity was key to the Ugandan struggle against the AHB/A. Perhaps without it, the bill would have become an Act within months after its tabling. The massive support from partners made the Coalition able to stand up against the bill for that long, and also it sent the government a clear message that many other persons were concerned about this law.

However, at times, the packaging of the support and the communication was wanting. Communication is vital to solidarity, and both parties should be able to listen to each other and acknowledge each other's positions. The relationship between local actors and international actors is largely an unequal one. Where a local actor may fear being arrested for doing or saying something, an international actor operating outside of the country may not have such fears. As such, to avoid exposing activists to danger, and also simply to be respectful, it is important to acknowledge that local actors are best placed to assess and make decisions about their own needs. They have to be listened to, however unpalatable their ideas may be. The listening must be genuine and the advice given must be followed.

On a topic as controversial as homosexuality in Uganda is, there may be a need to understand the nuances and the perspectives of different groups.

Not all that disagree with a particular point of view are 'homophobes'. There is a need to avoid generalisations and to refrain from painting the country or even, in some cases, the whole continent with one brush. Messages that are packaged have to be sensitive and also less disparaging. Sometimes giving lectures on how things should be done may not be the best way to get people to act and change.

**“Communication is vital to solidarity, and both parties should be able to listen to each other and acknowledge each other's positions.”**

## 8 International solidarity in the post-AHA period

Now that the AHB/A is no more, the international voices have greatly reduced. This is both positive and negative. It is positive in that the discussion on homosexuality and its resultant reprisals against LGBTI persons seem to have reduced. The negative part is that the nullification of the AHA/B has been interpreted as the end of persecution of LGBTI persons. In fact, violations go on almost as they used to when the AHB was still a bill, and indeed soon after its nullification there was an increase in the number of violations recorded.

What is therefore clear is that international solidarity is still needed moving forward. The struggle against the AHA is still ongoing with a case pending at the East African Court of Justice in Arusha seeking declarations that certain provisions of the law were against the rule of law and good governance principles enshrined in the Treaty. There are also efforts to resurrect the bill or similar laws. Again, recent reports show that violations continue against LGBTI persons (see, for example, Consortium on Documentation of Violations based



on Sex Determination, Gender Identity and Sexual Orientation 2015). Perhaps what should change is the nature of the support – a reduction in statements and speeches and an increase in support to build the capacity of local organisations and to support their work. Many organisations took a beating when the bill was passed and had to close. The few that remained are reorganising and they need to be supported in these endeavours.

## 9 Conclusion

International solidarity was very useful in the struggle against the AHA. However it is a double-edged sword that has to be handled with care. It all depends on how solidarity is used. It certainly needs to continue moving forward but in a form that is respectful not only of local organisations but also of Uganda itself as a country and Ugandans as people.

### Endnotes

- <sup>1</sup> The CFCS meetings that sit every two years were always incidentally linked with this process: the 2011 meeting was where news of the bill coming up for a vote in parliament sieved through; at the 2013 meeting there was a lot of uncertainty as to whether the bill had been shelved or not; and the 2015 meeting was where reflections on the struggle against the bill were held.
- <sup>2</sup> This group was led by Akina Mama wa Afrika (AMWA) which later became the first host of the Civil Society Coalition on Human Rights and Constitutional Law (CSCHRCL).
- <sup>3</sup> Aggravated homosexuality was defined in the bill to include: committing the crime of 'homosexuality' with a minor, or a person with a disability, and where the offender is a parent or guardian of the victim, or is in a 'position of authority' over the victim, or is a serial offender or uses drugs or any other matter on the victim in order to stupefy or overpower the victim with the intention of having homosexual relations with him/her.
- <sup>4</sup> An example was the murder of activist David Kato in 2011, which was reported on all major international news channels.
- <sup>5</sup> This author, for example, in 2011 alone attended a meeting where activists shared with US Secretary of State, Hillary Clinton on the sidelines of the Community of Democracies Meeting in Vilnius, Lithuania; met with the Canadian Foreign Minister, John Baird in Toronto, and was presented to the Ontario Parliament. Many of his colleagues such as Frank Mugisha and Kasha Jacqueline had similar and perhaps more high-profile meetings.
- <sup>6</sup> The first award was won by the first Coordinator of the Coalition Julius Kagwa, the Human Rights First Award for human rights defenders in 2010, and then the Executive Director of Sexual Minorities Uganda (SMUG), Frank Mugisha, won the Rafto Prize in 2011 and the RFK Award in 2011; Kasha Jacqueline, the Executive Director of Freedom and Roam Uganda (FARUG), won the Martin Ennals Award for Human Rights in 2011; and the CSCHRCL itself received the US Human Rights Defenders Award in 2011.
- <sup>7</sup> Notably American Jewish World Service (AJWS) and Astraea Foundation.

<sup>8</sup> LLH, the Norwegian LGBT Association.

<sup>9</sup> Kaleidoscope.

<sup>10</sup> UHAI-EASHRI, the East African Sexual Health and Rights Initiative.

<sup>11</sup> Hivos (Humanist Institute for Cooperation).

<sup>12</sup> *Kasha Jacqueline & Ors v Rollingstone Publications & Giles Muhame* (High Court Misc cause No 163/10).

<sup>13</sup> *Prof. J. Oloka Onyango & 9 Ors v AG*, Constitutional Petition No 08 of 2014.

<sup>14</sup> *Human Rights Awareness and Promotion Forum v Attorney General*, Reference No. 6/014.

<sup>15</sup> The author received the award on behalf of the CSCHRCL as its Coordinator together with the members of the Steering Committee.

<sup>16</sup> This is not, however, entirely true for in some cases especially after the law was passed there was a visible trend of denying visas mostly to those LGBTI activists who had not obtained the particular visas before and this was clearly an indication that some governments could not live up to what they themselves pledged to do. It was also perhaps the fear that such activists would seek asylum if given visas.

<sup>17</sup> See Avaaz.org, 'Still time to stop Uganda's horrific anti-gay law'. [www.avaaz.org/en/uganda\\_stop\\_gay\\_death\\_law](http://www.avaaz.org/en/uganda_stop_gay_death_law) (accessed 29 October 2015). This petition now has over one million signatures.

<sup>18</sup> All the mainstream media houses would show the progress as it happened including CNN, BBC and Al Jazeera.

<sup>19</sup> The US Africa Summit was on 4–6 August in Washington DC and the AHA was nullified on 1 August 2014.

<sup>20</sup> The NGO Bill 2015 is a proposed law that intends to control civil society organisations in Uganda. It gives powers to the NGO Board to refuse to register and to close organisations in the 'public interest' and organisations that do work that affects the dignity of the country are key targets. LGBTI organisations are certainly liable to be greatly affected by this provision.

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## Reflections on the Meaning of International Solidarity

### CLAIRE HOUSE

What strikes me most in writing about the meaning of international solidarity among contemporary lesbian, gay, bisexual and transgender (LGBT) movements is the cyclical quality these discussions often have, particularly discussions around ethics. By that I mean that key principles regarding how best to support LGBT rights movements in different, often marginalised, contexts worldwide are – it seems to me – well documented and repeatedly reiterated. We know, for example, that LGBT rights movements in the global North and West should not take credit for, or ignore the work of their colleagues in the global South and East. We also know that it is vital that organisations working internationally develop campaigns and programmes which are collaborative, consultative and culturally relevant, for example. Frankly, we also know that sometimes people don't do any of this and, depressingly, will probably continue to, and that others will – thankfully (but also depressingly) – criticise them for it.

This reiteration – a conflictual reiteration about what international solidarity should mean – surely itself serves an important function: to help create and narrate a shared set of ideas, practices and rules which help define what ought to be done. However, the repeated expression of these rules also doesn't seem to go far enough: it doesn't consistently result in a changed shared space for action and solidarity across borders. Moreover, for some, the discussion

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◀ Margaret Cho, an American comedian, fashion designer, actress, author, and singer-songwriter. Cho is best known for her critiques of social and political problems, especially those pertaining to race and sexuality.





itself is clearly a frustrating fact of movement life and work, whereby already marginalised communities are repeatedly urged to do the work of educating others.

This cyclical quality to discussions was something which struck me particularly strongly, in the lead-up to and during the discussions throughout my panel at the symposium on Sexuality and Social Justice: What's Law Got to Do with It?<sup>1</sup> In preparing my own presentation, I had been planning a straightforward focus on

“As individuals we might know that we all ought to be more consultative, collaborative, equal and open, for example, [but] we might not have thought deeply enough about what that means in reality.”

key findings from the recent consultation I had managed, into how organisations such as Stonewall (the UK's largest LGBT equality charity) can best support movements for LGBT equality internationally.<sup>1</sup> In particular, I intended to use my own platform on a panel looking at 'International Solidarity' to try to role model an ethical approach, by providing a platform for the views of consultation respondents on what 'good' and 'bad' solidarity looks like.

Respondents in general, I would highlight, wished to see a shift away from the sometimes single-issue, unilateral, self-centred, domestically minded (i.e. ethnocentric) and appropriative

models which have characterised some aspects of mainstream LGBT rights organising in the global North and West. Instead, they wanted to see approaches to mobilisation and support which were consultative, redistributive, intersectional, equal and open, culturally appropriate and locally led.

Throughout discussions during the first day of the conference, this focus shifted slightly. I was frequently witness to, and less frequently part of, some very positive and creative discussions about new projects and approaches. I had also witnessed, and occasionally been part of, some more critical – but equally positive and creative – discussions about global power dynamics, and how they were reflected within the international movement. Occasionally, as in many other international movement forums, I had seen these discussions sometimes boil over into conflicts around ethics, neo-imperialism and exclusion.

Responding to this, I wanted my presentation to focus less on reiterating core principles, and more on acknowledging and examining the cyclical nature of discussions about them. What is it about the way the international LGBT movement works – or doesn't – which leaves people having to reassert the same things over and over?

I don't have space to elaborate a full theory to explain all this here. However, I will suggest – as I did in my presentation – that the major barriers appear to me to be unconscious and institutional. By institutional barriers, I simply mean that the steps we take as individuals don't always amount to changes at an institutional scale; the cultures of our organisations, the values and ways of working we take for granted, and the way institutions are structured – and the ways they are structured together – does not always square with the ethical principles we repeatedly express as individuals.

By unconscious barriers I mean that while as individuals we might know that we all ought to be more consultative, collaborative, equal and open, for example, we might not have thought deeply enough about what that means in reality, and what practical steps we might need to take as individuals to step up to make it happen. One example is thinking more deeply about how we make sure we hear the voices of those who are often unheard. For example, we should consider how we could improve the diversity of panellists and speakers at events and conferences. We often hear of panels that are discussing LGBT but only include the L and G, and when we think about ethnicity the diversity can sometimes be non-existent. If we're truly to explore LGBT issues in the global South and East we need to have the voices of those campaigning in those countries represented and heard. At Stonewall, we know from our own experience that change works best when it is led by people on the ground, as they're the best to explain, decide and drive change forward.

None of this is to say that reiterating ethical principles is unimportant. It clearly is. But maybe we can reach a deeper and more transformative activism by acknowledging the cycle, seeing the frustrations it causes, and analysing what our own role could be in changing that, while acknowledging that – as feminist geographer Gillian Rose has formulated it – we can be absent and fallible (and repetitive) in ways which might not 'rest entirely in our own hands' (Rose 1997: 319).

#### Endnote

<sup>1</sup> Conducted between October 2014 and January 2015, responses were received from LGBT rights campaigners representing 66 organisations, in 55 countries; the vast majority from outside North America and Western Europe. Of those, semi-structured interviews were conducted with people representing 29 organisations, in 27 countries.

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# SOLIDARITY

## Solidarity and HIV Activism

**MATTHEW WEAIT**

Solidarity means different things to different people. For me, the ideas of mutual support, open communication and active engagement are central. To practise solidarity is to recognise and acknowledge difference, and to promote and defend the rights of others, even – and sometimes especially – if doing so is not in one's own immediate or long-term interests. It means giving to, and giving up for, others so as to achieve progressive social and economic change.

Solidarity can be understood, then, as setting aside self-interest in the interest of others, and establishing and deriving strength from what we are able to share rather than from what we are able to appropriate – from what we have in common rather than what separates us.

In my own scholar-activist work, which has centred on the impact of law on HIV prevention and on people living with HIV (PLHIV), both the challenges of, and opportunities for, solidarity have been evident; and the nature of immunity itself and how it can be

compromised go some way towards explaining why.

The immune system is not only the means by which our bodies defend themselves against disease. It is, in a very real sense, the means through which we distinguish ourselves from others, or 'I' from 'not I'. The identification and elimination of the foreign, the alien, is critical to our self-preservation and our self-identity. Immunity, in this way, can be read as a manifestation of an innate resistance to other bodies, other selves: as constitutive of the immanent boundedness that expresses itself in the foundational Western philosophical and political concepts of sovereignty and autonomy, and in the valorisation of practices of mastery, exclusion and separateness. It is perhaps for these reasons that HIV has been so feared, and people living with HIV have been so stigmatised. HIV breaks down the body's capacity to defend its borders, rendering porous what the immune system shores up and so compromising both its physical and ontological security. To be HIV-positive is to have one's mortality signified and one's autonomy compromised.

There is, though, a different way of seeing HIV – as a phenomenon that has, in both the developed and developing countries, in regions of high and low prevalence – provoked one of the most remarkable and sustained activist movements in recent history. The stigma and discrimination associated with HIV infection, the failure of governments adequately to fund prevention and treatment, the profiteering of pharmaceutical companies – these and other factors have all contributed to activist engagement and to social solidarity. Certainly there have been contestations and disagreements; and there have been failures

to ensure that the voices of women, migrants, people who use drugs, prisoners, and others who are socio-

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► Thembi is a volunteer peer educator at the Love Life centre in Cape Town. Thembi was tested positive for HIV a few years ago. Her boyfriend and their 16-month-old daughter are also positive.



“For me, that solidarity will fully flower when all people – whatever their status – are willing to declare themselves as neither HIV positive or negative, but as HIV affirmative – and to make that declaration with pride.”



economically marginalised for reasons other than their HIV-positive status or particular vulnerability are heard. But the fight against HIV and its impact on individuals and communities has brought people together in ways that demonstrate the power and beneficial effects of community and solidarity around a common cause.

There remain challenges, of course, and until HIV is eradicated one of the most significant of these is to find ways of eliminating the distinction, or rather the negative and destructive impact of the distinction, between those who live with HIV and

those who do not. To be HIV-positive is, in one sense, simply to satisfy a biomedically determined criterion, and the difference between those who are physically designated in this way and those who are not is, or can be, far less significant than what they share in common. People living with and affected by HIV have shown us what extraordinary change can be achieved through solidarity with each other. For me, that solidarity will fully flower when all people—whatever their status—are willing to declare themselves as neither HIV positive or negative, but as HIV affirmative – and to make that declaration with pride.

## Solidarity: Or When You, Me and Them is Much Less Than Us

**TAMARA ADRIÁN**

Solidarity has been defined as the unity or agreement of feeling or action, especially among individuals with a common interest, as the mutual support within a group. In that sense, what a powerful force solidarity is! It implies that a person is ready to transcend his/her private interests, in order to encompass and promote the interests of a group.

For any activist solidarity is a keyword. It constitutes the very essence of his/her actions, and the extent to which he/she is able to create ways to spread this solidarity among the members of a group, particularly among allies in groups that are not members of his/her own, ways to spread the goals he/she intends to promote and make them real.

In a sense solidarity is the true meaning of physical and emotional transcendence. You transcend your personal interests and your personal goals.

The word solidarity is relatively recent, although its root is the word *solidum* (whole sum). It seems that French was the very first language to use this word initially in French jurisprudence to refer to obligations created jointly and severally, replacing with it the word *solidité* (solid) used until the end of eighteenth century to refer to the situation in which two or more debtors were obliged to pay a full debt. From there we may see an unclear path in the way this word commenced to be applied to the

social context. 'One for all, and all for one', said the Three Musketeers and D'Artagnan to each other.

When it comes to the fight for equal rights for minority groups marginalised because of a certain common situation, for example, disabilities, national origin, religion, sexual orientation or gender identity, it is very clear that this goal cannot be achieved without solidarity. Particularly the solidarity among the members of one's group, but also, and perhaps much more important, the solidarity of the majority groups who have the economic and political power to change the way things are.

### Tamara Adrián

is a Venezuelan lawyer who graduated from the Andrés Bello Catholic University, Caracas, *summa cum laude* in 1976. She has a law doctorate, from Paris University, France and a diploma in Comparative Law, Paris Institute of Comparative Law. She is a law professor at the Central University of Venezuela, Metropolitan University and Andrés Bello Catholic University. Tamara has written extensively on law, and specifically on lesbian, gay, transvestite, transsexual, transgender, bisexual and intersex (LGTBTBI) law. She is president of the International Day Against Homophobia and Transphobia (IDAHOT) committee and co-president of the Gay, Lesbian, Trans, Intersex Sport Association (GLISA).



▲ First official speech of Tamara Adrián as candidate for the National Assembly, running for the elections of December 2015 in Venezuela.





In this sense, solidarity cannot be mistaken for compassion, even less with the origin of such compassion: pity. The compassionate person acts because the lack of action would lead to an internal psychological and moral conflict between what he/she thinks is good and his/her behaviour.

It cannot be mistaken for empathy either, which is understood as the ability to understand and share the feelings of another. Empathy may lead to altruism, i.e. the belief in or practice of disinterested and selfless concern for the wellbeing of others. This empathy might be induced by different means,

“In a sense solidarity is the true meaning of physical and emotional transcendence. You transcend your personal interests and your personal goals.”

including the use of media-spread messages. In this case, experiments have already shown that empathy-induced altruism can lead to the violation of the moral principle of justice, as those induced to altruism via empathy might be willing to allocate resources to the person or group for whom empathy was felt, and not to the person or group that in justice should have them.

As activists we must be clear: the sole force that might lead to the real transformation of an unequal reality is solidarity. We must therefore recognise it, and learn how to manage it and spread it among our constituencies and allies with a clear common goal.

▲ Tamara marching with neighbours in Las Mayas, in Caracas. Las Mayas is an urban area characterised by high indexes of delinquency and insecurity, but also by the combative spirit of its inhabitants.



# Solidarity

## Solidarity as an Ethical Position

ARTURO SÁNCHEZ GARCÍA

Every one of us who became academics because of a political urge to understand wider questions of justice, rights and inequality through critical thinking and research routinely practise an exercise of self-assessment, wondering about the relevance our work might have for people's struggles at the grass-roots level, for those who fight from day to day to achieve the goals that we also believe in.

We try to decipher what pushes people to go out to the street, to parliaments, to courts, to the international arena, to pursue radical changes. We hope to be able to contribute suggestions for new ways to redistribute material and symbolic resources in people's communities, and

eventually change the way specific groups are targeted by unfair (direct or indirect) exclusion and/or extreme forms of violence. We hope for theoretical knowledge to become meaningful.

I have learnt about solidarity as praxis, as the radical posture that one has to take in order to enter into – or, to put it more accurately, to properly assume – the situation of those with whom 'we are in solidarity'. We critically analyse the conditions that interfere with others' capacity to transform the situations that oppress them (or exclude them). But while we study complex systems of exclusion, the lived experiences of oppression remain incomprehensible for us, restricted by spatial-temporal (and geopolitical) frames in our work. We can produce knowledge about the way law reinforces unequal political systems, about economic inequality, epistemic appropriations, but we can never grasp the way experiences of suffering shape people's hopes and the way they imagine a better world to come.

To enter into someone else's situation, therefore, might appear as an impossible task. For that, from the different geopolitical

positions we occupy as scholars we are bound to unlearn things that we know, motivated by the highest respect towards those whose lives we try to study, and those whom we teach. We have to

understand that knowledge takes different paths, and most of the time we will not cross those paths in our own lived experiences. In order to be able to grasp what justice means for others we have to renounce objective truths and quit all attempt to speak on behalf of others.

“We should not indulge in academic endeavours that are not defined by deep ethical commitments.”

We should not indulge in academic endeavours that are not defined by deep ethical commitments. We can try to unlearn the trajectory of the history that is taught as the redemptive progressive trajectory of our present.<sup>1</sup> We can study instead past struggles because they illuminate current ones for us, and try to re-learn

what the future means for others. We can use all resources available in intellectual endeavours to materialise those futures.

To unlearn does not lead to solidarity with others alone, despite our most honest intention to come together in dialogue with others to gain knowledge of their social reality. In order to transcend mere intellectual curiosity about injustice we have to continuously try to enable joint actions and interventions in our environment.

Solidarity then becomes an ethical position where an academic always tries to learn better, and fairer, ways to engage with others.

### Endnote

<sup>1</sup> Rahul Rao and Svati Shah have already discussed subversive ways to read history in this Collection.

**Arturo Sánchez García** has a diploma in Independent Filmmaking (Asociación Mexicana de Cineastas Independientes (AMCI), Mexico), a degree in Communications (Universidad Iberoamericana, Mexico), a master's degree in Human Rights (Universidad Carlos III de Madrid, Spain), and a doctorate in Law (University of Kent). In his PhD research he analyses the legislation on abortion and same-sex marriage in Mexico City, and the parallel evolution of social movements and the judiciary in relation to democratisation. His research interests include feminism, postcolonial theory, social movements and queer theory. Arturo is currently exploring ways to link sexuality with the theoretical work of optimism and hope.



▲ International Women's Day in 1985 in Santiago de Chile. These women were attacked with a water cannon during a demonstration against General Pinochet.





## International Solidarity: A Question of Leadership

### LAME OLEBILE

The history of colonialism, violence and the disenfranchisement of Africa and its people has bred an incredible amount of apprehension and anger against non-Africans who seek to contribute to social justice movements on the continent and those who want to engage globally. These feelings are fairly warranted. The interlaced dynamics of this history, power (hidden and visible) and privilege must be brought into question as we broach the topic of international solidarity, what it means and what form it takes in practice.

The urgent need to establish principles that guide our collective work needs to be emphasised as we face dwindling resources for sexual rights and an increasingly efficiently organised, aggressive and conservative right-wing movement. These conditions should impel civil society movements to explore strategies in organising more effectively across borders and continents, hence the question of international solidarity. The negative impact of international solidarity that is exercised wrongly, and creates backlash, also pulls into focus the importance for organisations to move towards semi-formalisation of their international engagements.

It is apparent that international solidarity is a larger enquiry into leadership and accountability of those who wield power and privilege, as international solidarity is but one of the vehicles through which we exercise power in executing interventions for the advancement of human rights. Therefore, there is no 'one-off solution'. The 'feminist leadership diamond' (Batiwala and Friedman 2014) is one tool that could assist civil society organisations in scrutinising their ways of working. The feminist leadership diamond allows the analysis of power dimensions, shared politics and purposes, principles and values and the actual practice of international engagements, while also recognising the interconnection of these different factors – as points on a diamond, rather than isolated concepts.

Although the feminist leadership diamond offers a diagnostic approach for organisations seeking to know how close or far they are from achieving feminist leadership (*ibid.*), the method can be adopted as a means through

▲ Protest placards in the Geo-Dome on show at Dismaland, artist Banksy's play on the amusement park experience in Somerset, England.

**Lame Olebile** is a Pan Africanist feminist and formerly coordinator of Pan Africa ILGA (PAI). She was also coordinator of the Lesbians, Gays and Bisexuals of Botswana (LEGABIBO). Lame worked at the Durban Lesbian and Gay Community and Health Centre as Research and Mainstreaming Officer. Prior to that she was an advocacy officer and researcher with LEGABIBO. She led a research project on 'Increasing the Visibility of Lesbian, Bisexual and Other Women Who have Sex with Women'. Lame completed her studies in Political Science and Administration (University of Botswana) and is currently pursuing a master's degree in International Politics. She is also a member of FRIDA, the Young Feminist Fund Advisory Committee.



“International solidarity cannot be engaged in without due consideration for the possibly adverse impacts it may produce for the marginalised communities of interest.”

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which the North–South or South–South power dynamics and geopolitics may be made visible for the partners involved. It is through employing this analysis that clarity on shared politics and purposes may be found, leading to the establishment of principles and values that guide the practice of international solidarity.

When examining dimensions of power, the flow of resources from the North to the South indicates an imbalance of this form of power. Therefore, it is worth exploring to what extent these power imbalances are detrimental to meaningful international solidarity. Even though organisations may share a purpose to advance human rights, there is a

need for commonality in the politics that guide their work; these may be feminist politics on leadership, participation, assessing political environments, defining strategy and engaging communities. This is crucial for determining the principles and values that

guide their engagements. Agreeing on principles and values is a step to collectively developing inclusive and participatory advocacy strategies. Eventually, these culminate in a practice that enhances the positive effects of international solidarity; strengthening networks and relationships, reducing the tendency to prescribe solutions, spreading out resources much more efficiently and deepening our understanding of our politics and the various nuances of the contexts within which we work.

Essentially, it is the civil society organisations engaged in this process that exercise leadership and should remain accountable to their constituents. For that reason, international solidarity cannot be engaged in without due consideration for the possibly adverse impacts it may produce for the marginalised communities of interest. The feminist leadership diamond is a tool for a continuous reflective process that will strengthen international solidarity in a world of evolving socioeconomic and political landscapes.

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## Solidarity

### KATE BEDFORD

At the start of the second day of discussions at the IDS/ Kent Centre for Law, Gender and Sexuality event on

sexuality, poverty and law, I was asked to summarise conversations so far and to identify some emerging themes. I was struck by two themes in particular, both of which related very directly to the question of solidarity.

First, there was the theme of resources. There were many conversations at the symposium – including over dinner – about the material, institutional and emotional resources required to do work on sexuality and social justice. For me, those raised a set of key questions about the resources that people consider indispensable to doing this work, in terms of time to think and talk, shoulders to cry on, translation services, money, access to supportive spaces, experience, passwords for electronic libraries

and so on. I learnt from development activists in the 1990s that sustainable solidarity means generating, circulating, valuing, sharing, and exchanging resources differently. I know that the topic of mutual aid and sharing resources isn't exactly the sexiest one to have pulled out of the mix from a day of brilliant presentations, but it is very relevant to the topic of social justice, and declarations of solidarity can ring rather hollow unless it is front and centre in our minds.

The second theme that emerged for me from the symposium did so most clearly at the end of the first day, when Baroness Northover (Permanent Under Secretary of State for International Development) gave a keynote address. She grounded her remarks about sexuality and lesbian, gay, bisexual and transgender rights in a broader conversation about development and aid. The key terms for her were inclusion, poverty reduction, marginalisation and participation. So one question that we were left with, but we didn't get to discuss in depth, was whether people felt that development was a relevant or useful framework for them; and whether it would be helpful – or not – to locate discussion of sexuality and social justice in the

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language of development. Whether development can be a language of solidarity – given that it is so often experienced as a language of technocracy, depoliticisation and domination – is obviously a key larger question, but on the most basic level we can also ask: what do we know already about the role of law in pro-poor development, and is it worth trying to link up some of the conversations that we had in Sussex with some of those conversations? What role does law play in poverty reduction, for example, or women's access to land, or lower maternal mortality rates? That is an empirical question for research, but it is also a question about the potential for different sorts of cross-issue and cross-movement conversations. One great example is the work of the international group of poverty rights activists and academics in the International Social and Economic Rights Project;<sup>1</sup> other examples were raised in the symposium by

participants such as Gatete TK, Bisi Alimi, Nisha Ayub, Naome Ruzindana, Tatenda Muranda, Iñaki Regueiro de Giacomi and Svati Shah.

In other words, for those who are interested in locating some conversations about sexuality and social justice within development, we are not building the evidence base from the ground up: there is a vibrant, critical conversation within development about the contested role of law in contesting poverty, including around forms of law that might deal better with structural and systemic inequality than liberal anti-discrimination assurances. Forging closer connections with such work may help us all better identify the potential – and pitfalls – of law and development talk in our work on social justice.

#### Endnote

<sup>1</sup> [www.northeastern.edu/law/academics/institutes/phrge/projects/iserp.html](http://www.northeastern.edu/law/academics/institutes/phrge/projects/iserp.html) (accessed 20 October 2015).

▲ Third day of 16 days of activism against gender violence – women demonstrate in 2009 in Amuru, Uganda, to demand an end to violence against women.

“There is a vibrant, critical conversation within development about the contested role of law in contesting poverty, including around forms of law that might deal better with structural and systemic inequality than liberal anti-discrimination assurances.”



# Negotiating Triple Roles as Activists, Managers and Researchers in Vietnam's LGBT Movement

TU-ANH HOANG AND PAULINE OOSTERHOFF

The Viet Pride movement and the campaign to legalise same-sex marriage in the last four years has made Vietnam a phenomenon in the global movement

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**Pauline Oosterhoff** is a Fellow at the Institute of Development Studies (IDS) with over 25 years' international experience in public health, sexual and reproductive health and rights (SRHR) and HIV programme management, research, monitoring and evaluation (M&E) and training. She holds a PhD in Medical Anthropology and master's degrees in Political Science and Public Health. Pauline is an expert in mixed methods, participatory methodologies and in developing M&E systems for evidence-based planning and research. Her research examines intersections between health, human rights and gender. In addition, she has conceptualised, managed and edited documentary films, installations, soundscapes and performances in over a dozen countries.

for lesbian, gay, bisexual and transgender (LGBT) rights. Though same-sex marriage was not approved in the amended Law on Marriage and Family, rapid development of the movement in only a few years in the current political regime is significant and meaningful not only for the LGBT rights movement but also for the civil society movement in Vietnam in general. Though Vietnam has changed significantly after Doi Moi, the economic reform process that began in 1986, the current political regime is still reluctant to acknowledge the existence or support the development of civil society organisations (CSOs). It is in this complex context that the Centre for Creative Initiatives in Health and Population (CCIHP) and the Institute of Development Studies (IDS) conducted a study to understand how LGBT CSOs can affect legal and social change with regards to the laws that regulate sexual norms and unions in Vietnam. The study, conducted in 2013 and 2014, followed the two examples of collective action: (1) Viet Pride and (2) the

mobilisation for same-sex marriage in the revised Law on Marriage and Family.

The study was undertaken by one researcher from IDS and two researchers from CCIHP. The members of the research team were not only researchers with significant knowledge of sexuality research in the country; they were also long-time activists for gender equity and sexual and reproductive health rights in general and LGBT rights in particular, especially the two Vietnamese researchers. This combined knowledge and experience was an advantage. It helped the team quickly get a snapshot of the movement while being able to acknowledge the complex interactions of key actors in the LGBT movement. However, this insider-outsider dual role presented challenges as the researchers were exposed to criticism as both activists and as researchers, and yet were restricted in choice of words in the report that they could write. The wording had to be vague sometimes as certain terms are seen to alert people to sensitive issues and if they emerge in public documents it might cause conflicts. Knowing how to avoid conflicts is important in Vietnam for research organisations in order to be politically sustainable. Moreover, the two Vietnamese researchers are managers in their organisation with responsibilities to staff. In the context of state concern around CSOs, this type of research could bring great risk to the organisation.

This paper discusses the challenges that the researchers faced while trying to balance their commitment to this research (as researchers) alongside their solidarity with other CSOs (as activists and as managers). For example, the heterogeneous nature of the LGBT movement, with possible stigma and discrimination among the very different groups under this umbrella term, presented a challenge to solidarity.

“[Vietnam's] current political regime is still reluctant to acknowledge the existence or support the development of civil society organisations.”





▲ Bicycle rally at The American Club in Hanoi. VietPride 2014.

While same-sex marriage was high on the agenda of young gay men and lesbian women, it was not similarly prioritised by poor transgender people. A member of a transgender group explained the importance of understanding the unique and very different struggles facing different people who are too often described very generally as 'LGBT'. They said,

*We are not interested in legalising same-sex marriage... Our primary concerns are jobs and sex change. We cannot get good jobs because we dress and appear differently from the information on our identity card. Every day, some of us are dying because of sex-change procedures. However, no one cares about these needs.*

The heterogeneous nature of the LGBT movement can also be seen in the different priorities placed on HIV treatment and prevention. For example, one LGBT activist described a concern about linking HIV to the LGBT 'community', and the 'negative influence' this might have. They said,

*We understand the strength of MSM [men who have sex with men] groups working on HIV. However, we are scared of their image. They are related to HIV, which can have a negative influence on the activities of the community. These social activities are about human rights. We do not want them to be influenced by the image of HIV, although I know that the right to health is also important. When they join our activities, they do not wear the HIV hat but the LGBT hat. I do not see a strong connection between the activities of MSM groups and LGBT rights.*

Reflecting and respecting these different perspectives in the report and facilitating a calm and constructive discussion in the meeting room was not easy.

Another challenge relates to communicating the views of leaders of registered non-governmental organisations (NGOs) and non-registered groups. The two Vietnamese researchers had been working for a long time with most of the leaders of registered NGOs who participated in the research. Discussing the findings of research was seen, by some, as an opportunity for peers to criticise one another, claiming that 'other' NGO groups did 'not know the truth' and were 'not careful in making those statements'. Thus, it is important to make sure that research participants understand the nature of social science research (e.g. the differences between research and an investigation or an audit) and therewith their expectations about what the research team can and cannot do.

The triple roles of the researchers in this project were challenging but also contributed significantly to gain insights and complete the research successfully. In hindsight these experiences suggest that such challenges should be discussed among the research team in advance to help them respond more strategically and consistently in the situation. However, the possibility of combining the roles of researcher, activist and organisational manager is also new in Vietnam and therefore the issues that came up could not have been anticipated.

“It is important to make sure that research participants understand the nature of social science research ... and therewith their expectations about what the research team can and cannot do.”



# PART 4: CONCLUSION

## Behind the Frontline

CHERYL OVERS

Describing her early life at a time of war and subsequent cultural and political turbulence in her hometown of Zagreb, Croatia, Ivana Radačić reflected on having learnt 'how to build bridges between the different communities instead of burning them, as there was already a lot of fire'.<sup>1</sup> A glance at any discussion about public policy and sexuality in any country also reveals a lot of fire with predictable arguments about lesbian, gay, bisexual and transgender (LGBT) rights, abortion, sex work and pornography, etc. continually

being shot back and forth between opposing camps. Truces or territorial gains in this 'war' make news. We notice when a church begins to marry same-sex couples, when a human rights organisation supports sex workers' rights claims or when a government extends citizenship to transgendered people.

These campaigns and the battle for hearts and minds that they entail (apologies for the military references here) are consuming and tiring for activists, scholars and policymakers alike. Raging conflict about fundamental sexual rights saps resources and energy, frightens and polarises and continually tests the solidarity and connectedness





◀ Rally in Buenos Aires when the Congress passed the Gender Identity Law.

to each other of those on the receiving end of destructive law and policy on human sexuality and gender. It also creates a headache for public health and development agencies who have to navigate this murky, obstacle-littered terrain to do their work. And by compelling constant action and reaction, conflict stifles more nuanced collective thinking about sexuality and gender.

By momentarily stepping away from those larger polarised debates and into 'our' world of sexuality and gender knowledge and action we encounter very different and much more interesting tensions and ambiguities than those being fought out in public. We also encounter risk, as new ideas and alliances

emerge amid the raining of sometimes unpredictable voices. Gains in gender, sexuality and sexual and reproductive rights might feel well entrenched, and sexual minorities' rights demands have gained some traction, but previous experience illustrates their precarity. The benefits have not reached far enough in any direction and there is always potential for them to be very rapidly eroded, for example, by an unfavourable US election result.

I am excited by this Collection, the symposium that began it and the work of IDS Sexuality, Law and Poverty generally because by retreating temporarily

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from the perpetual frontline (I promise that's the last of the military metaphors) the dangerous ideas that precede change that is substantial and worthwhile can come forward.

## 1 Bridging the law gap

The first section of the Collection explores exactly what law might achieve in terms of social and economic justice in the contexts of gender and sexuality. Answers span economic and social inclusion, freedom from violence and discrimination, access to services, citizenship, suffrage, self-determination and other aspirations that philosophers pack together as components of a 'good life'.<sup>2</sup> This necessarily involves asking if law and legal processes administered by nation states can deliver good lives that include counter-normative sexuality and gender, given the

state's primary functions of ensuring that life is orderly, that institutions operate smoothly and that remedies are available to redress harms to individuals.

This in turn raises questions about how much energy should be expended on biopolitics, the powers that organise life. Some see law as a primary tool for resisting social or economic exclusion and violence, by both individuals and the state. As

well as the interesting theoretical issues that this question raises, it reflects a dilemma that many activists and organisations grapple with in practice – should scarce resources be put into campaigning for reform of legislation and to gaining access to legal processes through which justice, however formulated, might be achieved? Tensions around this central question are thematic. Working out how to use law to effect social change begins with recognising its paradoxical limitations as a tool of both emancipation and oppression.

lñaki Regueiro De Giacomi commented:

law gives us resources to translate social claims into structures, into an order that has already a defined structure. Law functions at the same time as a tool to maintain the status quo of a community – which is what it is often used for – but there are also some exceptional and wonderful cases where law proves to be the opposite, a tool for social change. That is the law that I am interested in.

In the search for when and where law is 'interesting' in this way, the varying determinants of how law affects lived experience are worthy of interrogation. That there are two sides to the coin of legal justice is clear, but less clear is when and how to resist its oppressive function while harbouring that which is protective and emancipative.

Religion, geopolitical and macroeconomic factors, gender inequality and culture are all considered in the search for buttons that can be pushed at different times in different places, by those seeking to tap into the 'interesting' and emancipatory aspect of law. HIV and public health has been an acceptable vehicle for dialogue about gender and sexuality policy, which has been especially important where religion has disproportionate influence. In this Collection, El Feki and Rehman describe this as wrapping sexuality in the 'white coat of public health'. Campaigns around violence against women in India and elsewhere have tackled victim blaming and in the process have illuminated and defended women's sexual rights so that anti-rape movements are now bound up with the culture of 'Slutwalk'<sup>3</sup> that asserts the right to a sexual autonomy alongside freedom from violence.

In a related but occasionally controversial vein, human rights and more recently macroeconomics and global development goals have been leveraged by international and national movements (see, for example, Badgett 2014). Moreover, art, social enterprise, social media and traditional protest all play important roles as the building blocks of social movements and communities that can destabilise problematic discourses even in the most politically and socially repressive settings. The photo essay from Chouf in this Collection demonstrates this use of art and social media to challenge and destabilise controlled and patriarchal legal and media regimes. Thus the avenues for interesting, challenging and destabilising interactions with law are varied and widespread; the contributions to this Edited Collection include numerous examples of these types of engagements.

At the same time as hopeful ventures into law, there are dangers. Demands for individual justice through more vigorous use of criminal law to combat hate crime and violence against women run up against the problem of the state. Reliance on HIV funding to organise for legal and human rights means accepting external conceptualisations of common identities and/or shared interests.<sup>4</sup>

Among all these rich pickings, the question of the engagement with law in the context of poverty, sexuality and gender, activists inevitably find themselves staring into gaps, and in some cases bottomless pits. Key theoretical questions emerge about whether patriarchal, capitalist states that enforce norms should be pushed out of, or invited into, norm-defying lives and bodies. As various entwinements of state and the 'queer body' are advancing in different ways in different places the questions of who does the inviting, who gets invited and on what terms, become primary, particularly

“The avenues for interesting, challenging and destabilising interactions with law are varied and widespread.”

since each opportunity for positive change also carries a risk of harm to individuals and to collective interests, especially on the part of the less powerful. For example, arguments advanced for law and policy that facilitates LGBT economic inclusion on the grounds of productivity may be useful to same-sex-attracted men whose health, age and ethnic status render them productive, but unhelpful and damaging to those in less productive categories. Similarly, advances to gender or sexual autonomy linked to the right to privacy and citizenship mean far less for those who cannot afford privacy or whose migration status renders them non-citizens.

Another crucial gap is between 'law on the books and law on the street', that is, between lived experience and the hope of justice. In contexts where the positive impact of legal mechanisms for protecting anybody's rights is flimsy or non-existent, it isn't surprising that campaigns for legalisation of homosexuality, abortion and sex work or litigation that reduces discrimination and human rights violations are questioned from several sides. Even where constitutions and statutes contain fine words they can contrast sharply to the reality of criminalisation of gender or sexual transgression and add fuel to the violence and discrimination from which law should protect people.

There are debates about whether the existing international human rights legal framework can extend economic and social rights at all, let alone into sexual counter-normative lives. Some authors embrace human rights and illustrate pathways for better use of them. In her interview Alice N'Kom recalls heading to meetings with politicians literally armed with copies of international law to support her argument that legalisation of homosexuality is more consistent with Cameroonian law than criminalisation because the hierarchically superior Cameroonian Constitution is legally linked to international treaties. Certainly LGBT communities can point to the Yogyakarta Principles in support of the idea that human rights can be transformative. However, it feels as if the most interesting tensions are at the limitations of human rights law and extend to the potential for the existing conceptual and legal architecture of human rights to be a part of the problem.

The human rights framework has been much critiqued in the global South and in Africa in particular. Holding states accountable and binding them to action and enactment of policy is clearly useful, but the capacity of human rights to protect people from poverty and inequity is in doubt and the focus tends to be upon individual civil and political rights rather than on bringing down the barriers to social and economic rights.<sup>5</sup> 'You can't eat human rights' is familiar shorthand for this dilemma. Concerns extend to calling into question the ahistorical and

decontextualised nature of the dominant human rights discourse which expresses a universal morality that some authors have argued convincingly 'furthers a neo-colonial imposition of Western ideals and norms onto non-Western cultures' (Muzyamba, Broaddus and Campbell 2015: 26).

Further developing this argument, Tatenda Muranda draws attention to the heteronormative nature of human rights law suggesting that it

can do little to challenge heteronormativity because of [its] internal normative biases. Problems of formulation also mean that human rights cannot adapt to the changeability and volatility of sexual orientation and gender identities and therefore have the unwanted effect of limiting variance in ways that facilitate erasure.

It is clear then that, even at its most 'interesting', law can only be part of the answer to the question of sexuality and gender justice.

## 2 Representation and resources

The second theme of the Collection is an insight into the value and architecture of solidarity and the representation of the various individuals and communities that need to fight back against oppression. Critiqued from various perspectives these also reveal interesting tensions around the nature of solidarity and action for social justice in a context in which resources are often scarce, contested and politicised.

Several authors describe and interrogate the ways in which language and resource allocations enable, constrain or influence action on sexuality and gender.<sup>6</sup> There is a rich layer of stories and histories about the dynamics of international support for programming and policy advocacy around LGBT, men who have sex with men, people living with HIV, women struggling for sexual and reproductive health rights, sex workers and transgender people.

Development, human rights and public health agencies have privileged international NGOs and organisations in the global North but many of them are well into the process of expanding their work to the global South in ways that are legitimately described as enabling.<sup>7</sup> However, these positive developments must be placed against a background of colonialism and patriarchy. In such a context, it is never far from mind that resources remain concentrated in the North and with them,

“There are debates about whether the existing international human rights legal framework can extend economic and social rights at all, let alone into sexual counter-normative lives.”



the power to determine priorities and strategies (see Wall 2015).

Although the dilemma of resource allocations and development policy made in the global North overshadowing social movements for sexuality and gender justice is most obvious in relation to large powerful organisations such as the UN, World Bank or EU whose potential to overpower, depoliticise and bureaucratised is clear, it is not limited to them. Similar questions to those raised by engagement with the state and with international organisations to achieve economic and social justice are found in relation to non-state actors. That many of these are well-intentioned allies is ironic. If there were not so much at stake Wanja Muguongo's and Adrian Jjuuko's<sup>8</sup> images of themselves tripping over small crowds of 'allies' enthusiastic to join campaigns against criminalisation of homosexuality in Uganda and Kenya would be amusing. They describe valuable engagement that is conducted within close strategic relationships with local activists alongside support that comes from the North, on the helpers' terms rather than theirs. But at the same time, for the majority of groups, financial support and attention is scarce, so they are

more likely to face the problem of how to access any resources, let alone become the 'cause du jour'. It is paradoxical that activists can replicate the very colonial and sexist imperatives that drive the violence and oppression that are being contested – but why wouldn't we? Unlearning and unravelling the habits of a lifetime must be a priority and there is a sense that better ways of doing that are urgently needed.

The paradox is not limited to international versus local agendas. Decisions about allocations of scarce resources are complicated by the reality that most of the organisations that address poverty, law, gender and sexuality in the context of international development depend on international donors. They must comply with donors' identifications of communities and populations, their understandings of issues and their procedures, policies and technical guidance. Juggling advocacy with caseloads of community health or social support is difficult, but the authority to represent is frequently derived from the fact that one occupies a service provision role. To simultaneously advance, benefit from and disrupt the business of human rights and development is a tall order.

▼ Cheri Ripley, in the American Samoan Community College. Cheri is a fa'afafine. Most of American Samoan fa'afafine are able to have gender reassignment if they so choose unlike their counterparts in Samoa.



The structure of development and human rights funding also means that the knowledge that drives programming is mediated through specific institutions including governments. This Collection, which itself comes out of an IDS programme funded by the UK Department for International Development, is exactly that – knowledge and evidence produced to inform development policy. The importance of getting that right can't be overstated. But nor can the role of resources in determining what knowledge counts. I have recently seen this struggle played out in the heavily contested terrain of sex work and sex trafficking. At first, knowledge produced by senior academics in elite US universities who urged that sex work be abolished by introducing harsher law dominated the debate in both academic and popular publications.<sup>9</sup> By contrast sex workers argued for decriminalisation on social media accounts with small numbers of followers and at meetings to which they had to be invited.<sup>10</sup> Over time that dynamic changed with the intervention of some small donors,<sup>11</sup> UN agencies and scholars, such as Svati Shah, whose various contributions made high-quality policy analysis and research possible and, crucially, enabled it to be communicated more effectively. Although something of a success story it was nevertheless overdue and arbitrary, and it was certainly controlled from the global North.

No matter how we answer questions about what solidarity and social justice is and whether it fits into the economic policy, development and public health paradigms through which resources and policy flow, ultimately there is no choice but to engage with them all. Nor is there any getting away from the fact pointed out by Jjuuko that the world is an increasingly interconnected place. The matters at hand, then, are not if it is worth engaging with law but what that engagement should look like, who should do it and pay for it and how the sexuality and gender focus can be sustained and advanced in concert with parallel struggles.

The 'interesting' tensions about power imbalance are at their most painful when we discuss solutions to the North and South problem, which takes place in the inescapable fact that development is neocolonial. Calls for more support for research and collaborations within the global South can be heard throughout this collection with practical suggestions about relocating knowledge production, better listening and collaboration, and more flexible grant-making. But while they are all good ideas, the question of root and branch reform of the language and institutions of development hangs in the air. On this analysis it is necessary but not sufficient to simply push for 'localisation' in development which, at its simplest, is shifting money and decision-making from the global North to the South, without necessarily reforming or addressing deep-seated structural problems.

Although significant progress has been made and important opportunities to continue are on the horizon, for example through the Sustainable Development Goals,<sup>12</sup> the task of 'queering development' still lies ahead. Whether social movements for gender and sexuality rights and justice can configure and position themselves within existing development policy and programmes while agitating for change is a pressing question. Addressing this question, Kate Bedford sees sustainable solidarity as generating, circulating, valuing, sharing and exchanging resources differently and points out that this doesn't need to be built from the ground up but is well underway.<sup>13</sup> Bisi Alimi describes his role in that process:

Shifting gear from being an activist to being an advocate means no longer going to policymakers and shouting 'I want, I want, I want!' Instead, as an advocate, we need to establish a baseline of where we are now and assess the institutions and mechanisms that keep the status quo in place. We need to look, too, at where we stand along the spectrum of potential actions in order to develop a strategy to get to where we want to go.

The 'spectrum of potential actions' is not endless, but as Kate Bedford suggests, there is much scope for joint working to improve upon already existing possibilities.

### 3 Contestations and compromises in the quest for joint work on sexual and gender justice

From the beginning, the unruly conversation was about the tensions occurring as various strands of action and thought about sexuality and gender spin together, what thread they are creating, and how it can be improved. Thus, just as an investigation of the architecture of solidarity and social justice opens up important questions about resources, it also demands that we fully explore joint working for sexuality and gender justice, the key tensions, common discourses and the most fertile grounds upon which social justice might be advanced.

Some of the clearest and most interesting tensions come in the wake of equal marriage. Alongside global support for the campaigns for same-sex marriage, disquiet grew about it being bound up with state-sanctioned heteronormative and neoliberal agendas. In this Collection voices on equal marriage, 'pink washing'<sup>14</sup> and other ostensibly neoliberal developments were raised by theorist observers as well as by those who feel passed over by the marriage equality wave. In Shah's view same-sex

“The task of 'queering development' still lies ahead.”



marriage marginally expands the terrain of citizenship rights for those with means, while doing little for those outside this purview. Transgender groups in particular have said that the emphasis on same-sex marriage and other 'equality' issues has subjugated their demands for legal recognition, appropriate health services and freedom from discrimination and violence, and similar points have been made by those concerned with economic issues or immigration and those challenging gender binaries.

This complex conversation raises the matter of relative power and priorities within communities or populations affected by enforcement of sexuality

“Pathways out of poverty for specific groups of people are entwined around discords.”

norms. A clear example of this is power imbalances that exist between the L, the G, the B, the T. Increasingly trans people have challenged the norms of the LGBT movement, as have young same-sex-attracted people and lesbians who are dealing with extreme poverty and marginalisation and are therefore unlikely to fit well into the celebratory mode of the cultures around same-sex-attracted people who have done

well out of 'LGBT equality'. But this disconnect is not fatal. Even along this apparent fault line we can see organisations led by gay men, including wealthy gay men, stewarding momentum in support of very poor same-sex-attracted people and transgenders. Having been named, strategies to solve this dilemma are in the pipeline, as Iñaki Regueiro De Giacomi tells us about Argentina and Paul Boyce has discussed in Nepal (Boyce and Coyle 2013).

Discourses that prioritise sexual pleasure, equality and freedom and focus on counter-normative identities and behaviours generate a 'woman problem' within sexuality activism. While women who have sex with women (WSW) and trans women (for better or worse) lie within, or are claimed by, the LGBT framework, women's sexuality issues generally are primarily recognised through the lenses of violence against women and sexual and reproductive health. How much contemporary feminism has to offer is debatable. Its most spectacular flounderings and deepest chasms have been about sexuality as illustrated by deep and ongoing feminist schisms over pornography or sex work with their attendant battles about consent, power, bodily autonomy and exploitation. On the other hand, some of feminism's greatest achievements have been challenging the laws and attitudes that ensure that women's sexuality is controlled and directed within patriarchy. This is the hand of interest to gender and sexuality activists.

Faith is perhaps the most well trodden of the traditional battlegrounds. It is fascinating to hear

the question being asked, 'are there other ways of imagining and negotiating this encounter?' El Feki and Rehman and others have argued powerfully that there are. They cite both secular and religious texts to support those arguments and point to significant accords and new spaces for same-sex-attracted people to practise their faith. But again, in view of the extent to which damaging policy on sexuality, gender and human rights has been driven by faith and faith-based institutions, we are gazing into large chasms. As a woman and sex work activist I find it difficult to ignore the US's Global Gag Rule against abortion and the President's Emergency Plan for AIDS Relief (PEPFAR) initiative that bound dependent NGOs to promote faithfulness and abstinence and took funding away from rights-based programming and reallocated it to faith-based organisations. At local level it's often even worse. During a conversation about the positive developments with faith leaders in some countries an African LGBT activist waved it away saying 'too soon, too soon'. The direct damage caused to him and his community by the Church and faith groups is too recent and raw for him to be very interested in such negotiations, on new or old terms. This is clearly an area where some very new thinking is needed to crack a tough nut, so I was fascinated to read that people are thinking about ways other than trying to convince faith leaders to be more tolerant. Initiatives such as the Lesbian and Gay Christian Movement in the UK<sup>15</sup> and countless other gay Christian associations, the Inner Circle in Cape Town<sup>16</sup> and the new 'gay-friendly' mosque in Paris exemplify such alternatives.

#### 4 'The unruly ground between hope and doubt'

At the outset Elizabeth Mills, Arturo Sánchez García and Kay Lalor signalled that the Collection searches for new ways to redress inequalities and injustice related to gender and sexuality through varied and complex 'manifestations, iterations and priorities at both global and local levels'. I have focused on some of the many contestations, paradoxes and ambiguities within the Collection, and I called them 'interesting tensions' because they define and illuminate the ground between hope and doubt. On such ground mixed feelings and uncertainties are necessary, useful, and valued for their potential to garner the diverse accounts of lived experiences and analysis into strategies to drive fundamental changes in how development, scholarship and activism on sexuality and gender is done.

Despite reoccurring commonalities that form a logical and organic platform for solidarity across the many intersections of sexuality, class, faith, race and gender, ambivalences about ways to attain social justice and to build pathways out of

poverty for specific groups of people are entwined around discords. It is right that there are definitional arguments and even conflict in the confusion of trying to navigate shifting forces, identifying and addressing sources of oppression, finding allies and avoiding complicity borne of frustration, exhaustion and material necessity. This is a risky process, deciding who 'we' are and questioning how much the identities that form that 'we' matter anyway. It certainly carries the risk of subsuming the question of gender and sexuality to the neoliberal framework of identity politics and the single-issue struggles by competing 'populations' however they are defined, configured and financed.

De Giacomi discusses a swing towards a stronger coalitional politics: that is, inclusion in a struggle for universal human rights that casts 'emancipation as one single phenomenon' that will not have been achieved while any group is left behind or forgotten. From this, a new language of solidarity emerges – one grounded not just in mutual cooperation but in actual indivisibility that leads to alliances that are joined up and powerful enough to make significant changes to existing paradigms. To do this involves harbouring 'the possibilities of an actual politics of intersectionality and cross-movement engagement, the recognition of the hierarchies within and between Queer communities' (Khanna 2014). On the other hand, the movement must creatively refashion itself beyond the law and enter the more difficult and diffuse social, economic and political realms. By intersecting with other structures of oppression, marginalisation and exclusion 'the Queer body' enters 'into assemblages with other bodies and political objects' (*ibid.*). The unruly conversations found in this Collection perhaps provide a point of departure for entry into these assemblages and for the messy, challenging and multifaceted action that follows.

## Endnotes

<sup>1</sup> Unless stated otherwise, all references are to articles in this Collection.

<sup>2</sup> The idea of a good life, human happiness or flourishing within a state is not new; see Aristotle's *Nicomachean Ethics*.

<sup>3</sup> For more on the Slutwalk movement including discussion of the frictions that arose when this local Canadian feminist movement was transnationalised see Herriot (2015).

<sup>4</sup> HIV epidemiology determines how people are grouped into categories and how those categories of people interact with each other, access resources and where and when they speak.

<sup>5</sup> Kenneth Roth, Mary Robinson and Leonard S. Rubenstein have discussed economic and social rights in the pages of *Human Rights Quarterly*. See Roth (2004) and responses from Robinson (2004) and Rubenstein (2004).

<sup>6</sup> See Alimi, Muranda, Ruzindana, Tapia, O'Connell, Shah,

Tangente in this Collection. Jjuuko also discusses resources in the wider context of activism and legal action around the anti-homosexuality bill in Uganda.

<sup>7</sup> Examples of this can be found in the work of the International Lesbian, Gay, Bisexual, Trans and Intersex Association, (ILGA) <http://ilga.org>, Women Deliver [www.womendeliver.org](http://www.womendeliver.org) and the Global Network of Sex Work Projects [www.nswp.org](http://www.nswp.org).

<sup>8</sup> Muguongo cited in the main introduction by Mills *et al.*, this Collection; Jjuuko in this Collection.

<sup>9</sup> See for example the publications of Melissa Farley at [http://prostitutionresearch.com/pub\\_author/melissa-farley/](http://prostitutionresearch.com/pub_author/melissa-farley/).

<sup>10</sup> 'Criminalise/decriminalise' is an oversimplification of the complex debate about the conflation of sex work and sex trafficking made here for convenience. It is discussed in detail by Svati Shah in this Collection.

<sup>11</sup> Including The Open Society Foundation, Mama Cash and the Robert Carr Foundation.

<sup>12</sup> The 17 Sustainable Development Goals (SDGs) are part of the 2030 Agenda for Sustainable Development that was adopted at the UN Sustainable Development Summit in September 2015. The SDGs are a set of universal goals 'to end poverty, fight inequality and injustice, and tackle climate change by 2030'. See UNDP Sustainable Development Goals at [www.undp.org/content/undp/en/home/mdgoverview/post-2015-development-agenda.html](http://www.undp.org/content/undp/en/home/mdgoverview/post-2015-development-agenda.html).

<sup>13</sup> Bedford discusses this in her contribution to this Collection with specific reference to the work of the International Social and Economic Rights Project (see [www.northeastern.edu/law/academics/institutes/phrge/projects/iserp.html](http://www.northeastern.edu/law/academics/institutes/phrge/projects/iserp.html)). She also highlights the work of several other contributors in this regard, including Gatete TK, Bisi Alimi, Nisha Ayub, Naome Ruzindana, Tatenda Muranda, Iñaki Regueiro De Giacomi and Svati Shah.

<sup>14</sup> Pink washing is generally understood as the use and exploitation, usually by a state, of 'LGBT friendly' policies as a marker of modernity and a strategy for masking human rights violations or injustices in other areas. See Puar (2013).

<sup>15</sup> Lesbian and Gay Christian Movement [www.lgcm.org.uk](http://www.lgcm.org.uk)

<sup>16</sup> The Inner Circle <http://theinnercircle.org.za/about>.

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▼ A man looks through one of the doors of the Palace of Sidi Bou Said, in Tunisia.

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The Gender, Sexuality and Social Justice Edited Collection is a cross-continental and multidisciplinary collaboration, bringing together critical theory, practical lessons and accounts of activists, academics and legal practitioners working to advance sexual and gender rights in over 20 countries that span almost every continent in the world. Built around two thematic areas, the contributions in the Collection interrogate the changing dynamics of sexuality and gender politics, and ask how law and legal processes translate into people's lived experiences in different socioeconomic, political and legal contexts.

Rather than offering a single unified response or simple solution for advancing sexual and gender justice, the Collection instead foregrounds the complexity of law, the messiness of legal processes, and the opportunities and limitations of engaging with legal frameworks in order to address social, economic and political exclusion. The contributions in this Collection seek out and explore the muddy, messy middle ground inherent in the politics of sexuality, gender and social justice. This is not done in the hope of solving the contradictions that inhere in this terrain, but with a view to thinking about new and transformative processes by which legal, historical and socioeconomic inequalities might be addressed and how the embedded power of the state or other actors might be made visible and challenged.



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